CABLE COPYRIGHT AND SIGNAL CARRIAGE ACT OF 1982

JOINT HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

AND THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 5949

TO AMEND TITLE 17, UNITED STATES CODE (RELATING TO COPYRIGHTS), AND THE COMMUNICATIONS ACT OF 1934, WITH RESPECT TO THE COMPULSORY LICENSING OF SECONDARY TRANSMISSIONS, LIMITATIONS ON RIGHTS TO SECONDARY TRANSMISSIONS, AND THE CARRIAGE OF BROADCAST SIGNALS BY CABLE SYSTEMS, AND FOR OTHER PURPOSES

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CABLE COPYRIGHT AND SIGNAL CARRIAGE ACT OF 1982

FRIDAY, DECEMBER 3, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The joint committee met, pursuant to notice, at 9:30 a.m., in room 235, Russell Senate Office Building, Hon. Bob Packwood (chairman of the Committee on Commerce, Science, and Transportation) presiding.

Staff members assigned to this hearing: Christopher D. Coursen, staff counsel and Thomas W. Cohen, minority staff counsel, Committee on Commerce, Science, and Transportation, Eric Hultman, general counsel, Committee on the Judiciary.

OPENING STATEMENT BY CHAIRMAN PACKWOOD

Chairman PACKWOOD. The committee will come to order.

Senators Thurmond and Leahy will be along very soon, but they indicated we should go ahead because it is a long witness list, and we have to finish at a reasonable time this morning because there is another hearing scheduled here this afternoon, and we have to clear out and set up for that hearing.

We are starting down the road today on a very complex subject involving both this committee and the Judiciary Committee; and I find in this bill the most interesting gaggle of interests bound together, tenuously perhaps, but bound together, and by and large I think in the public interest.

And I hope we can move on this bill. It will be my intention to have a markup next week on it, and the committee willing, send it out to the calendar. All of you are as familiar with that calendar as I am. What will happen in the last 2 or 2½ weeks of this session, if that's all we have, I do not know. But we will make a good faith effort to attempt to get the bill out.

OPENING STATEMENT BY CHAIRMAN THURMOND

Chairman THURMOND. It is a great pleasure this morning to join with the distinguished chairman of the Senate Commerce Committee, Mr. Packwood, in holding this hearing on H.R. 5949, the cable/copyright legislation.

It is not often that our two committees, Judiciary and Commerce, have matters of mutual interest, but when we do it has always been a pleasure to deal with the chairman and the other members of the committee, whether we agree or not.

Today, I am glad to say, I believe Chairman Packwood and I are in agreement. The legislation before us is the product of a hard-fought compromise between copyright owners, broadcasters, cable operators, religious broadcasters, and other groups. The bill has been before the House most of this session and it is now before our two Senate committees. It seems reasonable to me that if the parties are satisfied with this compromise, it should be acted on this year. Otherwise, all the hard work of the previous 2 years will have been wasted.

The bill gives broadcasters certain protections for syndicated programing they have purchased to show in their market areas. Cable operators receive a compulsory license to retransmit over-the-air programs without the difficult task of negotiating individually with copyright owners. Sports owners are given the protections granted previously by the FCC regarding blackout of distant signals during a local athletic event. Finally, the Communications Act is amended to reinstate the "must-carry" rules governing signal carriage between broadcasters and cable operators.

This compromise is not perfect. No compromise usually is—each party must give something up to achieve it. H.R. 5949 should be, in my judgment, approved by our committees and the Senate in this final session of the 97th Congress.

Finally, I understand we may hear testimony today that expresses dissatisfaction with H.R. 5949, both from parties who were not involved in the compromise, as well as from parties who were originally involved in it. We will listen to these witnesses, weigh their testimony, and then determine our future course of action.

On behalf of the Senate Committee on the Judiciary, I want to welcome our witnesses here today.

OPENING STATEMENT BY SENATOR LEAHY

Senate **LEAHY**. The broad scope of testimony before this committee on the subject of cable copyright reflects the extreme complexity of the issues we are trying to address. On Monday, 88 major trading countries ended a 6-day meeting in Geneva, where they sought to reach agreement on the equally complex problem of protecting the spirit of free trade. There is one issue that bridges both difficult subjects, and that is the issue of the lack of fair treatment by Canada of U.S. copyright holders when American broadcast signals are retransmitted by Canadian cable systems. Our law provides protection for Canadian copyright owners whose materials are retransmitted on U.S. cable systems, Canadian law provide none. As a result, trade between the United States and its major trading partner is dampened for the most important of all commodities—words and ideas.

Under the present law which the bill before us is amending, nonresident foreign nationals may make claims on the compulsory license royalty fund, regardless of whether their government provides any compensation for Americans in like circumstances abroad. In the case of Canada, things are made even worse by a law that denies an income tax deduction to Canadian businesses who advertise on U.S. stations in order to reach Canadian viewers.

In 1980 President Carter found that this Canadian law was an unfair trade practice burdening and restraining commerce in violation of the Trade Act of 1980. President Reagan has made a similar finding.

As the negotiators at the GATT meeting in Geneva found out, feelings favoring protectionism are running very strong throughout the world. The temptation to solve domestic economic problems at the expense of long-term international trade stability is great. Each can argue that its case is different and special and warrants an exception to the salutary rule of open trade. I know that in Canada there is strong pride in that country's cultural heritage and a need for a genuine sense of intellectual independence. But even if these reasons, rather than economics, are the basis for Canada's discriminatory copyright and tax laws, they do not justify unfairness. The Canadian entertainment and information business will not reach its potential if confined to the Canadian market, any more than the American movie producers or book publishers could if limited to the domestic American market. Economic growth and opportunity cannot be long separated from cooperation, and cooperation suffers greatly in the present atmosphere of imbalance.

I find absolutely fascinating the candid conclusions of a recent study commissioned by the Canadian Government on the subject of cable copyright issues. The report states:

> There is a tendency to feel that Canada can get something for nothing by restricting copyright payments abroad. That this is not always true was explained in the last paragraph, but it is probably close to the truth with present day realities.

I believe that Congress ought to adopt legislation imposing the same copyright limitations on Canadian copyright owners as are now borne by their American counterparts. I would frankly prefer to see open borders for ideas as well as goods, with full benefits to the owners of copyrights, whatever their nationality. If Canada were to reconsider its own restrictive legislation, I can think of no member of this body who would urge us to discriminate against the rights of foreign nationals in considering distributions from the Copyright Royalty Tribunal Fund. But short of reversing its present policy, I would urge the Congress to take the sound and logical step of barring rights to Canadians that Americans do not enjoy in like manner. I won't take the time of this committee with the details of my proposal, but the operative words are "equivalent treatment" and it is equivalent treatment that we must continue to hold out as our ideal.

The bill before us has been put together with a great deal of effort by Congressman Kastenmeier and others. It came together after much negotiation and many compromises. While I am eager to hear from some of the critics of H.R. 5949, my initial reaction is that the bill deserves our serious consideration and support. Congressman Kastenmeier deserves a great deal of praise for his work.

I am aware that, as with any bill that is this comprehensive and technical, virtually any change can unbalance the careful consensus embodied within it. I appreciate that the current session of the Congress is going to be a short one. As a result, I know that this bill may not be the ideal one for the amendment I am suggesting. That remains to be seen. But the time has come to encourage Canada to treat American copyright owners fairly, and I intend to bring the matter up early in the 98th Congress in the event there is no action in the current session.

We are fortunate to have with us this morning Mr. Peter Martin of Vermont, who is an operator of television station WCAX in Burlington. Mr. Martin faces in practice the problems I have been talking about in theory, and I am delighted he is able to join us this morning.

[The bill follows:]

II

97TH CONGRESS
2D SESSION

H. R. 5949

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 28 (legislative day, SEPTEMBER 8), 1982

Received; read twice and referred jointly to the Committees on Commerce, Science, and Transportation and the Judiciary by unanimous consent

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AN ACT

To amend title 17, United States Code (relating to copyrights), and the Communications Act of 1934, with respect to the compulsory licensing of secondary transmissions, limitations on rights to secondary transmissions, and the carriage of broadcast signals by cable systems, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Cable Copyright and Signal Carriage Act of 1982".

TITLE I—AMENDMENTS TO TITLE 17, UNITED STATES CODE

SECONDARY TRANSMISSIONS BY CABLE TELEVISION SYSTEMS

SEC. 101. (a) Section 111(a)(3) of title 17, United States Code, is amended to read as follows:

"(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content of the primary transmission or over the ultimate recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist primarily of providing wires, cables, or other communications channels for the use of others: *Provided, That the provisions of this clause extend only to the activities of said carrier or like entity with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; or*".

(b) Section 111(b) of title 17, United States Code, is amended to read as follows:

"(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: *Provided, however, That such secondary transmission is not actionable as an act of infringement if—*

"(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

"(2) the carriage of the signals comprising the secondary transmission is required by sections 341 and 342 of the Communications Act of 1934, as amended, and under the rules, regulations, or authorizations of the Federal Communications Commission; and

"(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.".

(c) Section 111(c)(1) and (2) of title 17, United States Code, are amended to read as follows:

"(c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

"(1) Subject to the provisions of clauses (2), (3), (4), (5), and (6) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under sections 341 and 342 of the Communications Act of 1934, as amended, and the rules, regulations, or authorizations of the Federal Communications Commission.

"(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, in the following cases:

"(A) where the carriage of the signals comprising the secondary transmission is not permissible under section 342 or 343 of the Communications Act of 1934, as amended, or under the rules, regulations, or authorizations of the Federal Communications Commission related thereto; or

"(B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d), unless, before the commencement of any infringement action brought against it pursuant to this section, the cable system, through corrective filings, has complied with the requirements of recording notices and depositing statements of account and royalty fees.".

(d) Section 111(c) of title 17, United States Code, is amended by adding the following new clause at the end thereof:

"(5) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, where upon receipt of the required notice from a commercial television broadcasting station which would be eligible for mandatory carriage by the system under section 341(b) of the Communications Act of 1934, but for the provisions of section 341(c)(1) of such Act, the system fails to delete the following syndicated television programming broadcast by any commercial television station without such eligibility for mandatory carriage:

"(A) series program packages while a commercial television broadcasting station with such eligibility for mandatory carriage by the cable television system has exclusive broadcast exhibition rights (both over-the-air and by cable) to that program package in its market; and

"(B) feature film while a commercial television broadcasting station with such eligibilty for mandatory carriage by the cable television system has exclusive broadcast exhibition rights (both over-the-air and by cable) to that film in its market: *Provided*, That each independent television broadcasting station shall be entitled to assert such exclusivity to no more than 300 feature film titles in any quarter of a calendar year and exclusivity to any individual film title shall be asserted in no more than two quarters per calendar year:

Provided further, That each network television broadcasting station shall be entitled to assert such exclusivity to no more than 100 feature film titles in any quarter of a calendar year and exclusivity to any individual film title shall be asserted in no more than two quarters per calendar year. The provisions of this clause shall not apply to any cable television system located outside of all television markets which existed as of November 1, 1981, or to any cable television system having 3,000 or fewer subscribers or to any broadcast television signal carried by any cable television system, regardless of number of subscribers or of location, prior to March 31, 1972, or by any other cable television system located in the same community as a system which carried that signal prior to March 31, 1972, or to any aspects of a waiver granted to any cable television system pursuant to the syndicated exclusivity rules and regulations of the Federal Communications Commission prior to June 25, 1981. The provisions of this clause shall be subject to the authority of the Federal Communications Commission under section 343 of the Communications Act of 1934.".

(e) Subparagraphs (B), (C), and (D) of section 111(d)(1) of title 17, United States Code, as so redesignated in section 402(a), are amended to read as follows:

"(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

"(i) 0.675 of 1 percent of such gross receipts for the first distant signal equivalent transmitted in whole or in part beyond the local service area of such primary transmitter;

"(ii) 0.425 of 1 percent of such gross receipts for each of the second, third, and fourth distant signal equivalents;

"(iii) 0.2 of 1 percent of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraphs (i) through (iii), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

"(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 percent, regardless of the number of distant signal equivalents (if any): *Provided, however,* That any cable system which carries no distant signal equivalents, or fraction thereof, is exempt from payment of any royalty fee under this subclause; and

"(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 percent of any gross receipts up to $80,000; and (ii) 1 percent of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents (if any): *Provided, however,* That any cable system which carries no distant signal equivalents, or fraction thereof, is exempt from payment of any royalty fee under this subclause; and".

(f) Section 111(f) of title 17, United States Code, is amended by striking out everything after the definition of "cable system" and inserting in lieu thereof the following:

"The 'local service area of a primary transmitter', in the case of a full service television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations.

"The 'local service area of a primary transmitter', in the case of other television broadcast stations or services, comprises the primary service area of such station or service, pursuant to the rules and regulations of the Federal Communications Commission. The 'local service area of a primary transmitter', in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

"A 'distant signal equivalent' is the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial educational station for the nonnetwork programming so carried pursuant to sections 341 and 342 of the Communications Act of 1934, as amended, or the rules, regulations, and authorizations of the Federal Communications Commission. The foregoing values for independent, network, and noncommercial educational stations are subject, however, to the following exceptions and limitations. Where the provisions of the Communications Act of 1934, as amended, or the rules and regulations of the Federal Communications Commission require a cable system to omit the further transmission of a particular program and the cable system elects to substitute another program embodying a performance or display of a work in place of the omitted transmission, no value shall be assigned for the substituted or additional program; where the rules, regulations, or authorizations of the Federal Communications Commission in effect on October 19, 1976, permit a cable system, at its election, to omit the further transmission of a particular program and such rules, regulations, or authorizations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, the value assigned for the substituted or additional program shall be, in the case of a live program, the value of one full distant signal equivalent multiplied by a fraction that has as its numerator the number of days in the year in which such substitution occurs and as its denominator the number of days in the year. In the case of a station carried pursuant to the late night or specialty programming rules of the Federal Communications Commission, or a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry, the values for independent, network, and noncommercial educational stations set forth above, as the case may be, shall be multiplied by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station.

"A 'network station' is a commercial television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day.

"An 'independent station' is a commercial television broadcast station other than a network station.

"A 'noncommercial educational station' is a television station that is a noncommercial educational broadcast station as defined in section 397 of the Communications Act of 1934.

"A 'full service television broadcast station' is a television broadcast station which operates on a nonpreemptive basis on a channel assigned to its community by the Federal Communications Commission pursuant to its table of assignments. This does not include television broadcast translator stations or any other limited television broadcast stations which may be authorized by the Federal Communications Commission.".

INFRINGEMENT OF COPYRIGHT

SEC. 102. Section 501 of title 17, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) Any secondary transmission by a cable system shall be actionable as an act of infringement pursuant to section 111(c)(5) unless the Federal Communications Commission within 90 days of receipt of a notice of violation has certified that such secondary transmission was due to technical error or other factors beyond the reasonable control of the cable system.".

FUNCTIONS OF COPYRIGHT ROYALTY TRIBUNAL

SEC. 103. (a) Section 801(b)(2) of title 17, United States Code, is amended to read as follows:

"(2) to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

"(A) The rates established by section 111(d)(2)(B) may be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act: *Provided*, That if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(2)(B) shall be permitted: *And provided further*, That no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The Copyright Royalty Tribunal may consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmission and, in the adjustment proceeding commenced in 1983 pursuant to section 804(a)(2), the impact of the deletion of nonnetwork television programming caused by the syndicated exclusivity provisions as codified in section 111(c)(5) of this title and section 343 of the Communications Act of 1934.

"(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(2)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. Such adjustment shall differentiate between those additional television broadcast signals on which a cable system is required to delete nonnetwork television programming pursuant to section 111(c)(5) of this title and section 343 of the Communications Act of 1934 and those signals on which no deletion is required by that system. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users: *Provided,* That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

"(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

"(D) The gross receipts limitations established by section 111(d)(2) (C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment; and".

(b) Subsection 801(b)(3) of title 17, United States Code, is amended by inserting before the period at the end thereof the following: ": *Provided,* That in accordance with section 111(d)(4)(C), a portion of such fees are distributed to copyright owners whose work consists exclusively of aural signals, and that at least $300,000 of such fees are distributed to copyright owners whose work consists exclusively of aural signals transmitted on those radio stations defined in section 397(6) of the Communications Act of 1934 that are eligible to receive funds under section 396(k)(6)(B) of the Communications Act of 1934; by January 1, 1985, and every third subsequent calendar year, the Tribunal shall review the distribution directed in this proviso and adjust the amount of such fees to be distributed under this proviso to reflect a fair and reasonable allocation, in accordance with this proviso, to the copyright owners identified herein".

(c) Subsections (a) and (b) of section 804 of title 17, United States Code, are amended to read as follows:

"(a) With respect to proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in sections 115 and 116, and with respect to proceedings under section 801(b)(2) (A) and (D)—

"(1) On January 1, 1980, the Chairman of the Tribunal shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter; and

"(2) during the calendar years specified in the following schedule, any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Tribunal, may file a petition with the Tribunal declaring that the petitioner requests an adjustment of the rate. The Tribunal shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Tribunal determines that the petitioner has a significant interest, the Chairman shall cause notice of this determination, with reasons therefor, to be published in the Federal Register, together with notice of commencement of proceedings under this chapter.

"(A) In proceedings under section 801(b)(2) (A) and (D), such petition may be filed during 1983 and in each subsequent third calendar year.

"(B) In proceeedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 115, such petition may be filed in 1987 and in each subsequent tenth calendar year.

"(C) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 115, such petition may be filed in 1987 and in each subsequent tenth calendar year.

"(b) With respect to proceedings under subclause (B) or (C) of section 801(b)(2), following an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established by the Tribunal, may, within twelve months, file a petition with the Tribunal declaring that the petitioner requests an adjustment of the rate. In this event the Tribunal shall proceed as in subsection (a)(2), above. Any change in royalty rates made by the Tribunal pursuant to this subsection may be reconsidered in 1983 and each third calendar year thereafter, in accordance with section 801(b)(2) (A), (B), or (C), as the case may be.".

TITLE II—AMENDMENTS TO COMMUNICATIONS ACT OF 1934

REQUIREMENTS APPLICABLE TO CABLE TELEVISION SYSTEMS

SEC. 201. Title III of the Communications Act of 1934 is amended by redesignating parts II, III, and IV as parts III, IV, and V, respectively, and by inserting after part I the following new part:

"PART II—CABLE TELEVISION SYSTEMS

"CARRIAGE OF BROADCAST SIGNALS BY CABLE TELEVISION SYSTEMS

"SEC. 341. (a)(1) The Commission shall place no restrictions on the number, type, or source of television broadcasting stations or other video services whose signals may be carried by a cable television system, except as provided pursuant to this Act.

"(2) Nothing in this Act shall prohibit the Commission from requiring a cable system to refrain from carrying a noncommercial educational station whose carriage is not required in this section, upon a showing of adverse impact upon a noncommercial educational station whose carriage is required in this section.

"(b) Except as provided in subsections (c), (d), and (e), the Commission shall require the carriage of television broadcasting stations (including television broadcasting translator stations) by cable television systems in accordance with its rules, regulations, and authorizations in effect on November 1, 1981, and shall not require the carriage of any other broadcasting station or—

"(1) any broadcasting station (A) which operates on a channel not listed in the table of allotments of the Commission as of November 1, 1981; or (B) which operates pursuant to an authorization by the Commission as a low power broadcasting facility;

"(2) any direct broadcast satellite service;

"(3) any station in the multipoint distribution service; or

"(4) any other radio communication service intended for direct reception by members of the public.

"(c)(1) Any cable television system having 36 or fewer activated channels may elect not to carry any television broadcasting station whose signal does not receive—

"(A) a 1 percent share of viewing hours in noncable television households in the county in which the cable system is located; or

"(B) a 2 percent share of viewing hours in all television households in such county;

except that such systems shall carry noncommercial educational stations and nonentertainment commercial stations whose signals are not viewed to the extent specified in this subsection in accordance with subsections (d) and (e), notwithstanding subsection (g)(1).

"(2) Any cable television system having 36 or fewer activated channels shall not be required—

"(A) to carry any network station which has the same network affiliation as a network station which the cable system otherwise is required to carry in any community which is located, in whole or in part, more than 55 miles (as determined in accordance with standards established in the rules, regulations, and authorizations of the Commission in effect on November 1, 1981) from the network station; or

"(B) to carry more than 2 network stations which have the same network affiliation.

A cable system, in determining which network stations may be deleted from carriage under subparagraph (B), shall delete such stations in order of their distance from the cable system, beginning with the most distant.

"(d)(1)(A) Any cable television system having 36 or fewer activated channels shall be required to carry not more than 3 noncommercial educational stations (including stations whose signals receive at least the percentage shares specified in subsection (c)) in any community located, in whole or in part, within the grade B contour of such stations.

"(B) Except as provided in subsection (e)(3), if a cable television system is required to carry a nonentertainment commercial station in a community under subparagraph (D), then such cable system shall be required to carry not more than 2 noncommercial educational stations in such community.

"(C) No cable television system shall be required to carry (i) 2 or more noncommercial educational stations which duplicate simultaneously 100 percent of their instructional programs and 90 percent of other programs; or (ii) a noncommercial educational station which requests not to be carried.

"(D) Any cable television system having 36 or fewer activated channels shall carry one, but shall not be required to carry more than one, nonentertainment commercial station in a community if—

"(i) that community served by such cable system is located, in whole or in part, not more than 35 miles from (I) the reference point (as defined by the rules, regulations, and authorizations of the Commission in effect as of November 1, 1981) of the community of license of such nonentertainment commercial station; or (II) any designated community of the major market (as defined by the Commission as of November 1, 1981) which includes the county specified in subsection (e)(3)(C); and

"(ii) such station was granted an initial construction permit by the Commission on or before August 4, 1982, and such station qualified as a nonentertainment commercial station based upon its regularly carried programming for a representative week during the first 30 days of regular broadcast operations subsequent to August 4, 1982, by such station.

"(2) Television translator broadcasting stations which rebroadcast the signal of a noncommercial educational station shall be considered to be noncommercial educational stations for purposes of this section and shall be entitled to carriage in the same manner on cable systems operating in communities served by the translator station as a noncommercial educational station where the cable system community is located outside the grade B contour of 2 noncommercial educational television stations and the translator station serves the community of the cable system and provides an adequately receivable signal at the cable system headend.

"(3)(A)(i) In selecting the noncommercial educational stations to be carried pursuant to this subsection, each cable television system shall carry each noncommercial educational station licensed to a community which is located, in whole or in part, in the same county as the community served by the cable system. If there is no such station in the county, then the cable system shall carry the closest in-State noncommercial educational television station. For purposes of this clause only, the noncommercial educational stations licensed to Newark, New Jersey, and Wilmington, Delaware, shall be considered to be licensed to New York, New York, and Philadelphia, Pennsylvania, respectively.

"(ii) Notwithstanding the carriage requirements set forth in clause (i), cable systems with 36 or fewer activated channels which are located within the grade B contour of a noncommercial educational television station licensed in the District of Columbia shall carry any such station, upon request, in addition to the closest in-State noncommercial educational television station.

"(B) In selecting the nonentertainment commercial station to be carried pursuant to this subsection and subsection (e), each cable television system shall—

"(i) carry the nonentertainment commercial station licensed to the community served by the cable system; or

"(ii) if more than one of, or if none of, such nonentertainment commercial stations meets the criteria established in clause (i), designate, in its discretion, the nonentertainment commercial station whose signal is to be carried, except that such cable television system shall not solicit or accept any payment from any such nonentertainment commercial station in connection with taking any action under this clause.

"(e)(1) Any cable television system having twelve or fewer channels shall not be required to carry any nonentertainment commercial station under subsection (d)(1)(D) which is not viewed to the extent specified in subsection (c)(1)(A) or (c)(1)(B).

"(2)(A) A cable television system shall not be required to carry any nonentertainment commercial station under subsection (d) if (i) such system serves a community located in any county specified in subparagraph (B); and (ii) such community is within the grade B contour of at least three noncommercial educational stations, none of which provides substantially duplicative programming, within the meaning of subsection (d)(1)(C).

"(B) The provisions of subparagraph (A) shall apply to cable television systems providing service in the following jurisdictions: (i) in the State of California: the Counties of Marin, San Mateo, Monterey, Napa, San Francisco, Solano, Sonoma, Contra Costa, Alameda, Santa Clara, and Santa Cruz; (ii) in the State of Maryland: the Counties of Howard, Montgomery, Prince Georges, and Anne Arundel; (iii) in the State of Michigan, the Counties of Oakland, Wayne, Washtenaw, and Monroe; and (iv) in the State of Virginia: the Counties of King George, Spotsylvania, Stafford, Prince William, Orange, Culpepper, Rappahannock, Arlington, Fairfax, Loudoun, Clarke, Warren, and Fauquier.

"(3)(A) A cable television system which is required in subsection (d) to carry the signal of a nonentertainment commercial station shall comply with such requirement by—

"(i) carrying a required noncommercial educational station, which is licensed to a school district or which is providing secondary or higher education services, during all or part of the period beginning at 7:30 o'clock ante meridian and ending at 4:00 o'clock post meridian, Monday through Friday; and

"(ii) carrying the required nonentertainment commercial station over the same channel during all other periods;

if such cable system serves a community located in any jurisdiction specified in subparagraph (B), except that any such cable system may elect to carry all such signals in full.

"(B) The provisions of subparagraph (A) shall apply to cable television systems providing service in the following jurisdictions: (i) in the State of California: the Counties of Riverside, San Bernardino, Orange, and Ventura; and (ii) in the State of Virginia: Charles City, Richmond, James City, and the Counties of Carolina, Hanover, Louisa, Goochland, Powhatten, Amelia, Chesterfield, Dinwiddie, Henrico, King William, King and Queen, Essex, Prince George, Surrey, Sussex, and New Kent.

"(C) In the case of Los Angeles County, in the State of California, if the signal of a school district station licensee is not required to be carried by a cable television system during any portion of a broadcast day, then such cable system shall carry the signal of a community college station licensee over the same channel during such portion of the broadcast day.

"(f) Cable television systems which—

"(1) are required to carry a nonentertainment commercial station or a noncommercial educational television station pursuant to subsection (d); or

"(2) elect to carry one or more additional nonentertainment commercial stations or noncommercial educational television stations whose carriage would be required by the rules, regulations, and authorizations of the Commission in effect on November 1, 1981;

may elect not to carry an equivalent number of network television stations which substantially duplicate the service provided by other signals being carried by the cable system pursuant to subsection (b). Such deletions of duplicating network stations shall be made in order of their distance from the cable system, beginning with the most distant.

"(g)(1) A cable television system shall carry any television broadcasting station required to be carried by subsection (b) and operating on the effective date of this section and any such station thereafter made operational—

"(A) if the station (other than a noncommercial educational station) is located not more than 35 miles from the cable system; and

"(B) until such station is subject to deletion under subsection (c), based upon publication of viewing share reports (that are bona fide independent professional audience surveys which are published annually and all of which were conducted after such station began operation) for the market served by such station;

except that, with respect to any cable television system having no vacant channel upon which to commence carriage as required by this section, the Commission shall authorize the deletion of a station required to be carried under this section and not otherwise deleted under this paragraph, or waive such carriage required by this section, such that the number of channels on the cable system devoted to the required carriage of television broadcasting stations is not increased. If carriage of a station pursuant to this subsection requires the deletion of a station which would otherwise be carried by the cable system and the station so carried may subsequently be deleted by operation of subsection (c), the cable system shall resume carriage of the broadcasting television station previously deleted under the exception in the preceding sentence.

"(2) Carriage of signals deleted pursuant to this subsection shall be required only upon expansion of the number of activated channels of the cable television system beyond the limit set forth in subsection (c).

"(3) Notwithstanding subsection (b) and subject to subsection (c), any cable television system with 12 or fewer activated channels may elect not to carry any television broadcasting station which transmits subscription television broadcasting programs, except that—

"(A) any such cable television system shall carry any broadcasting station which transmits subscription television broadcast programs if (i) such programs are transmitted by such station only between 12 o'clock midnight and 6 o'clock antemeridian; and (ii) such programs do not constitute a predominant (more than 50 percent) portion of transmissions made by such station; and

"(B) any cable television system with more than twelve activated channels may elect not to carry the signal of any television broadcasting station if more than 50 percent of the programming of such station is subscription television programming.

No cable system shall be required to carry the subscription television programming of any television broadcasting station.

"(h) The Commission shall prescribe such rules and regulations as are reasonable and necessary to carry out the provisions of this section.

"DELETION OF CERTAIN DUPLICATING NETWORK PROGRAMMING

"SEC. 342. (a) The Commission shall require cable television systems to delete the simultaneously duplicating network or noncommercial educational television programming of lower priority television signals in accordance with its rules and regulations in effect on October 1, 1981. Same day carriage of such programming also shall be considered simultaneously duplicating if the lower priority television station is located in another standard time zone from the cable system, except for cable systems in the mountain time zone for which the same day carriage of such programming shall be considered simultaneously duplicating only if the lower priority television station is located more than one standard time zone from such cable system, except that a cable television system need not delete same day duplicating network television programming from any station which such cable system normally carried on a full-time basis before October 1, 1981.

"(b)(1) A cable television system serving the community of license of a qualifying television broadcasting station may, at its option, delete any simultaneously duplicating network programming broadcast by any other television broadcasting station which is more than 55 miles from the location of the principal headend of such cable television system as of September 1, 1982.

"(2) If a cable television system does not exercise the option available to such cable system under paragraph (1), the qualifying station which would be the beneficiary of the programming deletion involved may petition the Commission to issue an order requiring such cable system to make such deletion. The Commission shall issue such order if it finds that such order serves the public interest. In making such finding, the Commission shall take into account whether the order (A) is necessary to protect the economic viability of such qualifying station; and (B) will impose any undue burden upon such cable system.

"(c)(1) Any television broadcasting station which is aggrieved by any violation of this section or section 341 allegedly committed by a cable television system may file a complaint with the Commission. The Commission, not later than 10 days after the date of such filing, shall determine whether the complaint presents a prima facie case that any such violation has occurred, and shall notify the cable system of such determination. The Commission shall make a final determination regarding the complaint not later than 60 days after such filing.

"(2) If the Commission finds that the complaint does present such a prima facie case, then the cable system involved, upon notice from the Commission, shall be required to end the violation alleged in the complaint until final disposition of the complaint or be subject to liability under the following sentence if the violation is sustained in a final determination by the Commission. If the cable system involved does not cease engaging in such conduct after the Commission has made such a finding that a prima facie case has been presented, then the Commission shall impose forfeiture penalties against the cable system operator commencing with the date of such notice to the cable system that a Commission determination has been made that a prima facie case has been presented. Any final determination as to a violation of this section or section 341 shall be made in a hearing conducted on a priority basis pursuant to section 503(b)(3).

"SYNDICATED PROGRAMMING EXCLUSIVITY

"SEC. 343. (a) Upon receipt of the required notice from a commercial television broadcasting station which would be eligible for mandatory carriage by a cable television system under section 341(b), but for the provisions of section 341(c)(1), such cable television system shall delete the following syndicated television programming broadcast by any commercial television station without such eligibility for mandatory carriage:

"(1) series program packages while a commercial television broadcasting station with such eligibility for mandatory carriage by such cable television system has exclusive broadcast exhibition rights (both over-the-air and by cable) to such program package in its market; and

"(2) feature film while a commercial television broadcasting station with such eligibility for mandatory carriage by such cable television system has exclusive broadcast exhibition rights (both over-the-air and by cable) to such film in its market, except that—

"(A) each independent television broadcasting station shall be entitled to assert such exclusivity to no more than 300 feature film titles in any quarter of a calendar year and exclusivity to any individual film title shall be asserted in no more than two quarters per calendar year; and

"(B) each network television broadcasting station shall be entitled to assert such exclusivity to no more than 100 feature film titles in any quarter of a calendar year and exclusivity to any individual film title shall be asserted in no more than two quarters per calendar year.

"(b) The provisions of this section shall not apply to—

"(1) any cable television system located outside of all television markets which existed as of November 1, 1981;

"(2) any cable television system having 3,000 or fewer subscribers;

"(3) any broadcast television signal carried by (A) any cable television system, regardless of number of subscribers or of location, prior to March 31, 1972; or (B) any other cable television system located in the same community as a system which carried such signal prior to March 31, 1972; or

"(4) any cable television system which was granted a waiver pursuant to the syndicated exclusivity rules and regulations of the Commission prior to June 25, 1981.

"(c) The Commission may grant exceptions to the requirements of this section, and to the requirements of section 111(c)(5) of title 17, United States Code, to cable systems where—

"(1) it has found that the distant signal on which a series program package or feature film appears (A) obtains a net weekly circulation of 5 percent or more in the county in which the cable system is located; and (B) places a grade B contour (as defined by the rules of the Commission) over all or part of the community in which the cable system is located; and

"(2) the market zone of the distant station on which the program appears overlaps with the market zone of one or more of the stations which possesses exclusive exhibition rights to such series program package or feature film.

"(d) The Commission shall promulgate such rules and regulations as are reasonably necessary to carry out the provisions of this section, including such rules and regulations as are reasonably necessary for the adequate and timely notification to the cable television system by the station eligible to request deletion under this section of the syndicated television programming to be deleted, the television broadcasting station from which deletion is to be made, and the time at which the affected programming is scheduled for broadcast.

"DEFINITIONS

"SEC. 344. For purposes of this part:

"(1) The term 'activated channels' means those 6 megahertz signal paths which are suitable for the transmission of National Television Systems Committee Standard color television in accordance with technical specifications of the Commission, and which are in use or are legally and technically usable throughout the entire cable system.

"(2) The terms 'cable television system' and 'cable system' mean a nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcasting stations. Such term shall not include (A) any such facility that serves fewer than 50 subscribers; or (B) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

"(3) The term 'community of license' means the principal community which a television broadcasting station is licensed to serve, as specified in the license issued to such station by the Commission, except that, for purposes of section 341(d)(1)(D)(i), the community of license for a nonentertainment commercial station which was authorized by the

Commission to engage in broadcast operations as of November 1, 1981, shall be the community of license specified by the Commission in the most recent renewal of license granted to such station before November 1, 1981, notwithstanding any subsequent grant of authority by the Commission for such station to change its community of license.

"(4) The term 'independent station' means a commercial television broadcasting station other than a network station.

"(5) The term 'network station' means a commercial television broadcasting station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of such station's typical broadcast day.

"(6) The term 'noncommercial educational station' means a television station which is a noncommercial educational broadcast station within the meaning of section 397(6).

"(7)(A) The term 'nonentertainment commercial station' means any commercial television broadcasting station whose regularly carried nonentertainment programming, exclusive of sports programming, exceeds 50 percent of all programming carried by such station during the total weekly broadcasting of such station—

"(i) from 6 o'clock ante meridian to 12 o'clock midnight, local time; and

"(ii)(I) from 6 o'clock post meridian to 11 o'clock post meridian, local time, in all time zones other than the central and mountain time zones; or

"(II) from 5 o'clock post meridian to 10 o'clock post meridian in the central and mountain time zones.

"(B) Programming which constitutes nonentertainment programming, other than sports programming, shall be determined in accordance with the rules and regulations of the Commission in effect on November 1, 1981.

"(C) The Commission shall have authority to determine whether a station has ceased to operate as a nonentertainment commercial station under this paragraph. No nonentertainment commercial station eligible for carriage under subsection (d) or (e) of section 341 may be deleted except after such a determination by the Commission.

"(8) The terms 'qualifying television broadcasting station' and 'qualifying station' mean any television broadcasting station which, according to the most recent bona fide nationwide professional audience surveys published before the effective date of this section, is located within a television market which—

"(A) has 35,000 or fewer television households in its area of dominant influence; or

"(B) does not have an area of dominant influence and which has 35,000 or fewer television households.

"(9) The term 'share of viewing hours' means the estimated percentage of total hours broadcast by a television broadcasting station which are viewed in the county in either all television homes or in all noncable television homes, or both. For purposes of establishing the share of viewing hours on a countywide basis, nationwide survey information such as that provided annually in an independent, professional, countywide audience survey shall be used. Share of viewing hours of stations which transmit both subscription and nonsubscription television programming shall be based only on the nonsubscription programming transmitted by such station.

"(10) The term 'television translator broadcasting station' is a television broadcasting station as defined in sections 74.701 and 74.731 of title 47, Code of Federal Regulations, as in effect on January 1, 1982.".

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 202. (a)(1) Section 3 of the Communications Act of 1934 is amended by striking out "part II" each place it appears therein and inserting in lieu thereof "part III", and by striking out "parts II and III" and inserting in lieu thereof "parts III and IV".

(2) Section 4(f)(3) of the Communications Act of 1934 is amended by striking out "part II" and inserting in lieu thereof "part III".

(3) Section 331(c)(3) of the Communications Act of 1934 is amended by striking out "subsection" and inserting in lieu thereof "title".

(4) Section 382(1) of the Communications Act of 1934 is amended by striking out "part II" and inserting in lieu thereof "part III".

(5) Section 503(b) of the Communications Act of 1934 is amended by striking out "part II or III" and inserting in lieu thereof "part III or IV".

(6) Section 504(b) of the Communications Act of 1934 is amended by striking out "parts II and III" and inserting in lieu thereof "parts III and IV".

(b)(1) Section 214(c) of the Appalachian Regional Development Act of 1965 (40 U.S.C. App. 214(c)) is amended by striking out "part IV" and inserting in lieu thereof "part V".

(2) Section 509(c) of the Public Works and Economic Development Act of 1965 (42 U.S.C. 3188a(c)) is amended by striking out "part IV" and inserting in lieu thereof "part V".

TITLE III—SPORTS PROGRAMMING

SECONDARY TRANSMISSIONS BY CABLE TELEVISION SYSTEMS RELATING TO SPORTS PROGRAMMING

SEC. 301. Section 111(c) of title 17, United States Code, as amended in section 101(d), is further amended by adding at the end thereof the following:

"(6) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if—

"(A)(i) the primary transmission is made in the period from September 1 through the second Saturday in December of each year and consists of the nonnetwork live television broadcast licensed for local distribution only of an intercollegiate football game, or any substantial part thereof, involving institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course; and

"(ii) the secondary transmission is (I) beyond the local service area of the primary transmitter, and (II), if a VHF station, more than 120 miles from the site of the primary transmitter or, if a UHF station, more than 45 miles from the site of the primary transmitter; or

"(B) the secondary transmission is in violation of regulations of the Federal Communications Commission as of December 31, 1981, regarding sports broadcasts (47 C.F.R. 76.67).".

TITLE IV—MISCELLANEOUS PROVISIONS

EXTENSION OF MASTER ANTENNA EXEMPTION

SEC. 401. Section 111(a) of title 17 of the United States Code is amended by striking out subparagraph (1) and inserting in lieu thereof the following:

"(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission nor is any charge made, direct or indirect, to see or hear any other video or audio service and—

"(A) the secondary transmission is made within the local service area of such station; or

"(B) the signals are received by such establishment by means of the direct reception of a free space radio wave emitted by such station; or".

ELIMINATION OF NOTICES OF IDENTITY AND NOTICES OF CHANGE

SEC. 402. (a) Section 111(d) of title 17, United States Code, is amended by striking out paragraph (1) and redesignating paragraphs (2), (3), (4), and (5) as paragraphs (1), (2), (3), and (4), respectively.

(b) Section 111(d)(2) of title 17, United States Code, as so redesignated in subsection (a), is amended by striking out "clause (2)" and inserting in lieu thereof "clause (1)".

(c) Section 111(d)(3) of title 17, United States Code, as so redesignated in subsection (a), is amended by striking out "clause (5)" and inserting in lieu thereof "clause (4)".

(d) Section 111(d)(3)(B) of title 17, United States Code, as so redesignated in subsection (a), is amended by striking out "clause (2)" and inserting in lieu thereof "clause (1)".

(e) Section 111(f) of title 17 of the United States Code is amended by striking out "subsection (d)(2)" in the definition of a "cable system" and inserting in lieu thereof "subsection (d)(1)".

(f) Section 801(b)(2) of title 17 of the United States Code is amended by striking out "111(d)(2)(B)" each place it appears therein and inserting in lieu thereof "111(d)(1)(B)".

(g) Section 801(b)(2)(D) of title 17 of the United States Code is amended by striking out "111(d)(2)(C) and (D)" and inserting in lieu thereof "111(d)(1)(C) and (D)".

FLEXIBILITY IN STATEMENTS OF ACCOUNT

SEC. 403. Section 111(d)(1) of title 17, United States Code, as so redesignated in section 402(a), is amended by striking out subparagraph (A) and inserting in lieu thereof the following:

> "(A) a statement of account, covering the six months next preceding, specifying such data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal, from time to time prescribe by regulation; and".

CLARIFICATION OF TIERING ROYALTY CALCULATIONS

SEC. 404. Section 111(d)(1) of title 17, United States Code, as so redesignated in section 402(a), is amended by inserting after subparagraph (D) the following:

> "(E) In computing the amounts payable under subparagraphs (B), (C), and (D), above, a cable system shall comply with requirements that

the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal, from time to time prescribe by regulation, with respect to the appropriate calculation of gross receipts for the basic service of providing secondary transmissions of primary broadcast transmitters and distant signal equivalent values. The regulations may take into account such secondary transmissions made to a limited number of subscribers or carried on a tier other than the initial tier of service.".

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

SEC. 405. (a) This Act, and the amendments made by this Act, shall become effective on the date of the enactment of this Act, except that—

(1) as to cable television systems located in the first 50 major television markets, the programming syndicated exclusivity protections of section 111(c)(5) of title 17, United States Code, as added by section 101, shall take effect at the expiration of 6 months after such date of enactment;

(2) as to cable television systems located in the second 50 major television markets, the syndicated programming exclusivity protections of section 111(c)(5) of title 17, United States Code, as added by

section 101, shall take effect at the expiration of 12 months after such date of enactment; and

(3) as to all other cable television systems subject to the provisions of section 111(c)(5) of title 17, United States Code, as added by section 101, section 111(c)(5) shall take effect at the expiration of 24 months after such date of enactment.

(b) Notwithstanding the provisions of section 111(c)(5) of title 17, United States Code, as added by section 101, no syndicated program embodied in a television broadcast signal comprising a secondary transmission must be deleted by a cable system if (1) the program is embodied in a television broadcast signal delivered via satellite transmission; (2) the primary transmitter of such signal acquired broadcast rights to the program before the date of the enactment of this Act; and (3) the primary transmitter has provided written notice to the cable system that the program may be retransmitted by the cable system.

Passed the House of Representatives September 28, 1982.

Attest: EDMUND L. HENSHAW, JR.,
Clerk.

By W. RAYMOND COLLEY,
Deputy Clerk.

Chairman PACKWOOD. Our first witness today is Bob Kastenmeier, an old friend of mine of long standing from the House of Representatives, and probably the man that has done more to get the bill this far than anybody else in the Congress.

Bob, I am delighted you could come over today. The Hon. Robert Kastenmeier of Wisconsin.

STATEMENT OF HON. ROBERT W. KASTENMEIER, CHAIRMAN, HOUSE JUDICIARY SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

Mr. KASTENMEIER. Thank you, Mr. Chairman.

I appreciate those kind words. It is certainly a pleasure to join with you today in an effort to examine legislation which I think will go a long way to resolving one of the most difficult copyright law controversies the Congress has faced: the copyright liability of cable television systems.

As members of your committees know, under the Federal copyright statute, authors and other copyright owners generally enjoy exclusive rights to control markets and reap financial rewards from their creations. However, in very special circumstances—and this is one—the copyright laws created a compulsory license giving certain users guaranteed use of work in exchange for assuring the author has some remuneration for that use.

The author relinquishes control over the work as well as the right to have the market decide its value in return for guaranteed payment for the exploitation of the work in a manner permitted by the statutory licenses.

In the case of cable transmission the Congress determined that compulsory licensing was appropriate because vast numbers of cable television systems were in fact retransmitting the signals of over-the-air broadcasters without a recognition of copyright liability. In fact, the Supreme Court in two separate cases has determined that the then existing copyright law did not apply to such retransmissions.

Since the Congress was for the first time imposing a liability, it was appropriate, I think, that the powers of copyright owners be limited by the compulsory license. Had we not done so, most assuredly the growth of a major new industry may well have been stopped dead in its tracks.

Under the terms of the compulsory license which we fashioned in 1976, cable systems do not negotiate for retransmission of rights copyrighted video products and do not pay royalties directly to copyright owners. Rather the royalties are paid to the Copyright Office, distributed to copyright owners by the Copyright Royalty Tribunal.

Since the passage of the 1976 act 6 years ago, the cable compulsory license has come under increasing criticism I think largely as a result of three developments: First, the enormous growth of the cable industry and the entry of large, well-financed corporations into the market; second, the development of satellite retransmission technology and the superstations; and third, deregulation of the cable industry by the FCC.

In fact, as early as 1979 the subcommittee which I chair was urged to reopen the 1976 act. While we did have a number of days of hearings, we did not, of course, at that time enact any legislation. However, in 1981 the real catalyst for change in the compulsory license occurred. The FCC had repealed syndicated exclusivity and distant signal rules which had for many years restricted the use of over-the-air broadcast signals by cable television systems. The repeal of these rules was subsequently upheld in the Circuit Court of Appeals for the Second Circuit.

So in 1981 my subcommittee did hold extensive hearings on the compulsory license, as well as the impact of the deregulation. Representatives of the motion picture, professional sports, and broadcasting industries testified in fact in favor of abolishing the compulsory license, citing these several developments which I have mentioned before in support of their view that the cable industry is now able to purchase copyright programing in a free market just as their competitors do.

The cable industry, however, testified that it would be impracticable and unduly burdensome to require every cable system to negotiate for the use of each copyrighted program. However, following the hearings and with the encouragement of my subcommittee specifically, the three major interest groups involved in the controversy—the National Association of Broadcasters, Motion Picture Association of America, and the National Cable Television Association—began discussions which eventually led to the compromise legislation approved by the Judiciary Committee.

It was a difficult negotiation, and I certainly compliment the industry leaders in their perseverance, their creativity, and willingness to compromise.

Subsequently, under the guidance of the gentleman from Colorado, Congressman Wirth, the House Telecommunications Committee of the House Commerce Committee was able to fashion a resolution of the controversy on mandatory carriage by cable systems of broadcast signals.

The resolution of this issue resulted in the additional support of the National Association of Religious Broadcasters and certainly retention of the active support of the National Association of Public Television Stations, as well as the rest of the coalition.

Mr. Chairman, I am aware that not every interest group or every constituent of every interest group is completely satisfied with H.R. 5949. Certainly the problems of those groups may have to be addressed in the future. However, the legislation before you represents an almost unprecedented effort to accommodate a broad range of special needs and the public interest within the context of a rapidly changing economic and technological environment.

In these closing days of the 97th Congress we have a unique opportunity to demonstrate that cooperation, negotiation, and honest compromise can produce needed reforms in the legal structure of one of the Nation's most important growth industries.

I sincerely hope the opportunity for this progress will not be lost because of the short time available in this Congress. The confusion and industry rivalry which characterize the present system do not promote the rapid growth of new communications technologies whose development is so necessary to our national economic wellbeing.

Mr. Chairman, I strongly urge you and your colleagues to join us in the House in processing this bill with a minimum disruption of public law. If we fail to do so, I sincerely wonder whether in the next Congress we would ever, ever be able to put the pieces back together again.

Thank you, Mr. Chairman.

Chairman PACKWOOD. Congressman, thank you.

Let me ask you just one question about the must-carry provisions. We have, in essence, grandfathered the must-carry provisions and said henceforth with lower power stations or anything else you do not have to carry them.

Does that seem fair, those who are in are going to be carried, and those who are coming in are not going to be carried?

Mr. KASTENMEIER. Well, I think it is certainly fair to those who are already in.

Now, obviously I suspect in broadcasting we have seen analogies in the past in terms of allocation of signals. And this is a problem. It is a problem, on the other hand, of cable capacity. It is a problem most particularly looked at, of course, by our Commerce Committee since they deal with must carry as a matter of communications policy rather than copyright policy. So it did represent a compromise in terms of accommodating an already extant interest and yet responding to the problem of how many channels will be available and on what sort of priorities do you allocate those channels.

That is why perhaps it may seem unfair to future entrants into specialty markets, and, indeed, one day we may have to review this. But for the time being I think it is really the best we can collectively do on that question.

Chairman PACKWOOD. I see nothing wrong with must-carry provisions, and I like the idea of local television. I do not want to see them squeezed out by eight or nine supernational, international signals that simply block them out finally. But I do have some misgivings about saying to the new low power stations, who are promising at least that these stations are going to be for minorities and for others because there is going to be so many of them, that they will not have access to cable systems, which will be a significant disability, I fear.

Mr. KASTENMEIER. Of course, they will not have compulsory access, but they may indeed be carried.

Chairman PACKWOOD. They may, but we even have a provision in here requiring carrying of the religious broadcast stations just because the assumption is that they do not get a big enough portion of the audience that they would be carried except for the compulsory carriage. And I am afraid many of these lower power stations initially will have very fractured, very small audiences, maybe loyal audiences but very small, that would not justify carrying them solely on the basis of the market.

Senator Specter.

Senator SPECTER. Nothing right now.

Chairman PACKWOOD. Bob, I have no other questions. Thank you very much.

Congratulations on getting it this far. I know how much time you have spent over the years. It is a masterful job to have gotten the coalition together that you got together.

Mr. **Kastenmeier**. I hope we can keep that coalition together. I do not know for how much longer. In any event, I hope that the Senate can help us resolve this issue.

Chairman **Packwood**. Thank you for coming.

Next we are going to hear from Bernie Wunder, the Assistant Secretary for Communications and Information from the National Telecommunications and Information Administration, the man who is well known both to this committee and the House committee for his extraordinary work when he served as counsel to the House committee for a number of years.

Bernie, we have relied upon you perpetually, and we are here to listen to you again.

STATEMENT OF HON. BERNARD J. WUNDER, JR., ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. **Wunder**. Thank you, Mr. Chairman, Senator Specter.

I have a radically different position on this than Chairman Kastenmeier. The administration is strongly opposed to this legislation.

Chairman **Packwood**. I was going to say as I read your testimony this was not one of those where the administration says well, we have no position.

Mr. **Wunder**. That is right. Nor did we have a lot of trouble getting this position developed. There is unanimity on this position within the administration.

Chairman **Packwood**. Let me ask you a question, Bernie. So much so that they would veto the bill?

Mr. **Wunder**. That is a hard question to answer. It would certainly be my recommendation.

Chairman **Packwood**. It would depend on what the final form of the bill is?

Mr. **Wunder**. Sure. If it passes in this form——

Chairman **Packwood**. You would recommend it be vetoed?

Mr. **Wunder**. I would recommend it be vetoed.

I think the bill goes in absolutely the wrong direction. In 1976 there might well have been a good case to be made for a compulsory license, but what has happened in the cable industry, given the enormous growth and the significant concentration that has occurred, is today we have 25 cable companies that have 64 percent of the business. I cannot see a situation where it would be unduly burdensome for the Times Mirror Company or American Express to deal directly with copyright holders.

And the solution to the problem—and I agree with Chairman Kastenmeier that the problem is caused by the repeal of syndicated exclusivity and the growth of the cable industry—is to make the big cable companies deal with the big movie producers and the copyright holders and then exempt out the small ones, continue the compulsory license for them. So then at least you are moving in the right direction. You are moving to a free marketplace. You are moving to deregulation. You are getting away from a Copyright Tribunal. I do not know of anybody that has spoken highly of the performance of the Copyright Tribunal, and it is not all their fault.

Chairman **Packwood**. I have heard some recent criticism of it.

Mr. **Wunder**. I am sure you have.

They have had extreme difficulty in determining the rates and they have had extreme difficulty in distributing the money. The 1980 moneys have yet to be distributed. Every time they make a decision on the distribution of the money it is litigated by those who do not think that they got their fair share. And I think this is an ideal place for deregulation, and deregulation is the way that we are moving, the way that you have been moving in all other phases of the telecommunications business; and I think this area is ripe for it.

My position, the administration's position, is really no different than the position of a number of the parties last year, until this compromise was worked out. We are opposing it just on the basis that it is bad policy, it is not moving in the right direction, and it is overregulatory. We are codifying rules that really need not be codified.

Take, for instance, "must-carry," the questions you were asking Chairman Kastenmeier. You know, my thought on that is leave must carry where it stands with the Commission, and then in those instances where it may be the right public policy to include someone else, they have the capacity to do it. Do not lock it in granite. Do not lock syndicated exclusivity into granite.

Chairman **Packwood**. What do you think about must carry generally?

Mr. **Wunder**. Must carry generally? I have ambivalent feelings about must carry generally. I think that the goal that must carry generally seeks to achieve as we now have it will be extant no matter what. I do not see cable systems dropping the type of signals in question for any reason. I think that is one of the things that they have that enables them to market their product.

I think the only problem that I have heard about must carry that causes me some concern is that if must carry were dropped, that in Portland, Oreg., you could drop the local ABC affiliate and bring in WABC. You would get all the network programing, but the local portion of your Portland affiliate for ABC could be dropped in favor of WABC. That is really the only problem I see with must carry. So it is a close call for me, but I come down on the side of keeping it but keeping it at the Commission and not codifying it.

We have testified a number of times on this bill, and our position has been constant, and it is something that we would not like to see happen. And I will conclude on that.

Chairman **Packwood**. Well, what I want to guarantee happens is that we have reasonably good, strong, local television. I do not want to run the risk of it being wiped out if somehow carrying the national ABC programs except for the local news is going to destroy some financial base of the local ABC affiliate.

Mr. **Wunder**. That is what causes me to come down on the side of keeping must carry where it stands. I really cannot conceive, Senator Packwood, of the FCC repealing must carry. I think they had their chance when they repealed the distant signal rule, when they repealed syndicated exclusivity. They have kept must carry, they have kept network nonduplication, and they have kept those rules for which there is a strong sentiment as you have expressed.

Chairman PACKWOOD. Let me ask you this, Bernie. If we were to strip this bill down to the things that you like, would there be anything in it?

Mr. WUNDER. Sure.

Chairman PACKWOOD. What?

Mr. WUNDER. What there would be in it would be a compulsory license for all of the small cable companies.

Chairman PACKWOOD. Those that are beyond the 200 markets, or 3,000 or less subscribers, or something like that?

Mr. WUNDER. Something like that. Exact formulas can be worked out, whether it be big markets, number or size of the cable system, whether it is an MSO—you know, some formula along those lines. You would have the compulsory license for the remainder, and you would have the provisions eliminating the compulsory license for the big systems that were to be excluded.

This bill, Senator Packwood, when you read through it, it is so——

Chairman PACKWOOD. Careful, now. It is an interesting collage.

Mr. WUNDER. Yes, it is.

Chairman PACKWOOD. Senator Specter.

Senator SPECTER. Mr. Wunder, what is your view on the position of the sports teams which would like to see some sort of a blackout rule?

Mr. WUNDER. I am generally sympathetic to the position of the sports people. I think that the solution that I have recommended takes care of the sports people. They would be in a bargaining position with the major MSO's, which is really where the money is. They would retain control of their product. Chairman Kastenmeier has talked about the compromise between NCTA and NAB and MPAA; the sports people are a significant part of the entertainment programing business, and they were not included.

I would not like to see them included in this bill because I do not like the bill, period, and just adding to it exacerbates the problem. What would not exacerbate the problem and which would take care of the sports people is the type of approach that I have suggested.

Senator SPECTER. From the consumer's point of view, if the blackout rule is imposed there are going to be many less sporting events on cable. But do you think if it were left to the marketplace that it would work out that there would be many contracts arranged so that sports would be available?

Mr. WUNDER. Absolutely. Just look at the NCAA. You see people negotiating for sports contracts all the time. They want to sell their product. What they want is control over their product.

Senator SPECTER. You testified that you think the big cable companies ought to deal individually with the big movie producers, would this be feasible in practice?

Mr. WUNDER. Or alternatively, Senator Specter, you could set up some kind of brokerage arrangement. There would be people coming into the marketplace to act as agents on behalf of a group of program syndicators or a group of MSO's.

Senator SPECTER. Well, if you say that the big cable companies should work with the movie industry, what is wrong with doing it through the statute where they apparently have agreed to this kind of an arrangement? In a sense there has been an agreement by those parties under the terms of this legislation.

Mr. WUNDER. You have Government regulation and a Government bureaucracy handling something that Government regulation and Government bureaucracy need not handle because it can be handled as efficiently in the marketplace. Indeed, things do not have to work very efficiently in the marketplace to work more efficiently than Government regulation.

And so I think it would be an extremely simple thing for these people to get together in the marketplace. People are getting together and selling programs in the marketplace all the time. HBO does. The pay services do. The broadcasters do. And there are a lot of broadcasters, many more than the 25 cable systems I have just mentioned to you.

Senator SPECTER. Thank you very much, Mr. Wunder. Thank you, Mr. Chairman.

Chairman PACKWOOD. Let me ask Bernie how this works now on the sports. How do they by contract protect themselves? If they want the blackout while local sports events are being played and broadcast, how do they achieve that by contract?

Mr. WUNDER. Well, they have an exclusive right to their property. The person could not broadcast or cablecast their product unless they went to the individual in question and negotiated for the rights to do that. And I think as with all things that those types of things are negotiable. I think you have willing buyers and willing sellers in the marketplace.

Chairman PACKWOOD. What I do not understand is this—and Mr. Turner is going to testify later. Out goes the Atlanta Braves game from Mr. Turner's station and it comes down in Cleveland while the Cleveland Indians are playing, and the Cleveland Indians do not want it coming down while the Cleveland Indians are playing.

How, under contract, do the Cleveland Indians stop that?

Mr. WUNDER. The question would be how do the Atlanta Braves sell into Cleveland, given objections by the Cleveland Indians?

Chairman PACKWOOD. Well, how do the Cleveland Indians stop the Atlanta Braves from selling into Cleveland?

Mr. WUNDER. One approach might be to adopt the current FCC rules that you have where the blackout is imposed. And second, the question would be the timing of when the Atlanta Braves came in.

Chairman PACKWOOD. I understand the FCC rules. I thought, Bernie, that you were saying that this could be done by contract somehow, and I am trying to figure out how you could do it by contract.

Mr. WUNDER. Not blackout, not blackout. What I am saying is that the Atlanta Braves could come into Cleveland on days or times when the Indians were not playing.

Chairman PACKWOOD. But there is no way you could do it by contract. That is going to have to be done by some kind of Government regulation.

Mr. **Wunder**. That is right.

Chairman **Packwood**. Senator Mathias.

Senator **Mathias**. Thank you, Mr. Chairman.

Mr. Wunder, there is one aspect of this situation that concerns me. I have been involved, one way or another with copyright compensation for nearly 20 years. As I understand it, following deregulation the Copyright Royalty Tribunal adjusted the rates that were paid by cable operators, or at least some cable operators, for some of the distant signals that they used, and that this is a discharge of the Tribunal's responsibilities under the act.

Mr. **Wunder**. Yes, sir.

Senator **Mathias**. And reflected the changes in the industry as a result of deregulation.

Mr. **Wunder**. Yes, sir.

Senator **Mathias**. What is the administration's position with regard to the controversy that has now grown up around that particular episode of this whole drama?

Mr. **Wunder**. About the increased rates?

Senator **Mathias**. Yes.

Mr. **Wunder**. We really haven't taken a position, but I can tell you my personal judgment is that I thought that the decision by the Copyright Tribunal was moving in the right direction. I think, for the reasons that I indicated earlier, that the changes, the significant changes in the industry, warranted the type of decision that was made by the Copyright Tribunal.

Senator **Mathias**. Well, now, I do not want to string it out, but what do you think were the significant changes that provided a proper foundation for the Tribunal's actions?

Mr. **Wunder**. Elimination of syndicated exclusivity and elimination of the distant signal rule, plus the growth in the cable industry. That is not one of the statutory items, but elimination of syndicated exclusivity and the dropping of the distant signal restrictions were bases upon which the Tribunal could proceed.

Senator **Mathias**. Does that provide a quid pro quo for the adjusted rates?

Mr. **Wunder**. You are asking me for a judgment on whether or not——

Senator **Mathias**. Does that balance one against the other?

Mr. **Wunder**. I would think it does.

Senator **Mathias**. And suppose they eliminated the adjusted rates. Where would that leave the balance—tipped heavily in favor of the cable operators?

Mr. **Wunder**. Yes, sir.

Senator **Mathias**. In your judgment.

Mr. **Wunder**. Yes, sir, in my judgment.

Senator **Mathias**. Thank you.

Chairman **Packwood**. Senator Dole.

[No response.]

Chairman **Packwood**. Bernie, thank you very much.

Mr. **Wunder**. Thank you, Senator Packwood.

[The statement follows:]

Statement of Bernard J. Wunder, Jr., Assistant Secretary for Communications and Information, U.S. Department of Commerce

Thank you for giving me this chance briefly to reiterate the Reagan Administration's strong opposition to passage of cable television copyright legislation along the lines of H.R. 5949.

We believe H.R. 5949 is fundamentally unsound for the following reasons. First, the bill is intensely regulatory. This Administration has been a strong and consistent proponent of cable television deregulation. The Federal Communications Commission (FCC) in 1980 also determined that very substantial reductions in prevailing cable regulations were in order.[1] H.R. 5949, however, would reimpose, the old "syndicated exclusivity" regulations and, indeed, render them even more complicated and intrusive. It would place statutory constraints on the exclusivity broadcasters can buy against competing cable exhibition of feature films, for instance. It would also make complicated changes in the FCC's present "must carry" regulations, and cement them in statute. In short, although both the Administration and the FCC have consistently been urging greater reliance on marketplace forces in the cable field, H.R. 5949 would force us all to move in the opposite direction.

Second, H.R. 5949 is not only intensely regulatory. It is also needlessly so. In 1976, there might have been some plausible public policy basis for the very regulatory approach reflected in the cable copyright legislation Congress passed, and which H.R. 5949 seeks to reinforce. Whatever may have been true then, however, there is no reason for Congress today to treat cable television any differently from the other competitors in the electronic marketplace. The cable television business today is a multibillion dollar enterprise. It is nationwide in scope and increasingly characterized by very large corporations including American Express, Westinghouse, Time, Inc., and others. Eleven of the top 25 cable firms in 1976 have since been merged or acquired by other companies. Over 80 percent of all households served by cable today are served by one of the 25 largest cable companies. The 20 largest multiple system operators (MSOs) now account for about 65 percent of the 29 million cable households, with the four largest firms accounting for nearly a quarter of all cable subscribers.[2]

All of the other commercial participants in the mass entertainment field play basically by one set of copyright rules—full copyright liability. I know of no sound reason today for Congress to perpetuate, indeed entrench, some special set of rules for the cable television business.

I appreciate the arguments some have raised. Some contend that because of special industry circumstances, full copyright liability could not work efficiently in cable. I do not believe these concerns are warranted, however. Last December, NTIA released an extensive analysis of cable copyright issues.[3] Our study demonstrates how relying chiefly on a marketplace approach—full copyright liability—could work in cable television and, moreover, ought to be allowed to do so.

The basic problem implicit in the special cable copyright arrangements established in 1976 is the high probability of substantial marketplace distortion over time. Even given the increased "Distant Signal Equivalent" rates the Copyright Royalty Tribunal recently ordered, the present system tends both to undercompensate program producers while, at the same time, giving cable systems every incentive to "overconsume" the broadcast product. The economic problems and distortions that thus ensue are analogues to those that have arisen unfortunately in energy, telephone, transportation, and other lines of commerce. And they are particularly vexing given the presence of readily available, workable, marketplace alternatives.

From a telecommunications policy perspective, there are two important and related reasons why the needless economic distortions inherent in H.R. 5949 should be avoided. First, a prerequisite to the further, competitive development of existing and emerging electronic entertainment and information services is the availability of sufficient programming or "software." Program producers must be afforded an adequate incentive to produce more programming in order to meet expanding demand and to facilitate more effective competition.

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[1] See Cable Television Deregulation, 71 FCC2d 632 (1979), 79 FCC2d 663 (1980), aff'd sub nom. *Malrite TV of New York* v. *FCC*, 652 F. 2d 1140 (2d Cir. 1981), cert. denied, 50 U.S.L.W. 3566 (1981).

[2] See Report of the Democratic Staff of the House Subcommittee on Telecommunications, Consumer Protection, and Finance, "Telecommunications in Transition; The Status of Competition in the Telecommunications Industry," 97th Congress, 1st Session, Comm. Print 97-V at pp. 293-94.

[3] See NTIA Staff Report, Cable Copyright Liability: Alternates to the Compulsory License (December, 1981).

Traditionally, we have relied on the unregulated marketplace to determine what constitutes an adequate incentive to produce. We should continue that reliance here and thus phase out the present cable copyright regime with its compulsory license, statutory fees, and Copyright Royalty Tribunal, ostensibly tasked with making nearly impossible judgments about what constitutes an "adequate" royalty fee.

Second, but no less important, we should not perpetuate and entrench a regulatory system that accords any one competitor in the marketplace a special preference. Implicit in the concept of effective competition is the requirement that it be full and fair, with competitors succeeding or failing in a free marketplace chiefly through their own endeavors—and not because of special privileges accorded them by a preferential regulatory system.

At least since 1934, broadcasters have been required to bargain and negotiate in the marketplace for the programming so important to commercial success. 47 U.S.C. Sec. 325 (1976). The cable television industry today does the same with respect to the "software" needed to sustain pay cable offerings. There is no good reason why cable television's use of nonlocal broadcast signals should be treated any differently today.

More than 9,600 radio stations and 1,240 television stations seem able to function well in the programming marketplace without special, preferential copyright arrangements. Most of these stations are far smaller commercial enterprises than most cable television systems. There are also more than 1,900 movie theatres nationwide, and they too seem able to operate consistent with conventional copyright laws. No party has recommended Congress establish a special copyright system to further the commercial interests of the more than 6,000 low power television stations that have been proposed, or the many multipoint distribution systems (MDS) or direct broadcast satellite (DBS) systems also on the drawing broad.

If cable television were truly a small, struggling "cottage industry," and were the last best hope for affording the American public more information options and greater news and entertainment choices, perhaps some sort of preferential copyright system would be defensible. Cable television today however, is but another—albeit major—player in our increasingly competitive and diversified video marketplace. In sum, there is no compelling public policy reason, in my view, to continue to afford cable special copyright prerogatives that are not extended to its actual and potential marketplace competitors.

In testimony before Chairman Kastenmeier's subcommittee and in other proceedings, the Administration has consistently stated that it believes the cable television industry today has achieved a degree of maturity and stability incompatible with maintaining, much less entrenching, the present extraordinary cable copyright scheme.[4] FCC Chairman Fowler also indicated at that time that he supports the Administration's position on the desirability of relying upon a marketplace approach. I am providing a copy of his statement for inclusion in the record. Rather than seeking through interstitial, piecemeal amendments to "refine" the 1976 cable copyright arrangements, we should move rapidly in the direction of an orderly phasing out of this undesirable system and toward adoption of a full copyright liability system.

Chairman PACKWOOD. Next we will go to a panel, the panel being Tom Wheeler, Eddie Fritts, R. E. Turner, Jerry Rose, Henry Cauthen, and Stephen Effros.

And I might say to the panel that we have four panels today, and I have indicated that we have to be out of this room in time to set up for a hearing this afternoon. So I am going to ask each of the witnesses to hold their comments to 5 minutes. Your statements will be in the record. But if we are going to finish this by 12:30 or 1, considering that the members will want to ask questions, we just have to ask the panel to hold their comments to that limit.

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[4] See Testimony of Assistant Secretary Bernard J. Wunder, Jr., before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, on cable copyright, June 24, 1981 and June 3, 1982; Testimony of Deputy Assistant Secretary Dale N. Hatfield before the Senate Judiciary Committee, May 29, 1981; Letter from Assistant Attorney General Robert A. McConnell to House Judiciary Chairman Peter Rodino, concerning H.R. 3560 (cable copyright legislation), dated March 22, 1982.

When we put on the next panel I am going to ask Mr. Stein to testify first. Arlen Specter wants to hear him and has to leave shortly, and so we will put him on first on the sports panel.

Mr. Wheeler, go right ahead.

STATEMENTS OF THOMAS E. WHEELER, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION; EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS; R. E. TURNER, CHAIRMAN OF THE BOARD, TURNER BROADCASTING SYSTEM; JERRY ROSE, SECOND VICE PRESIDENT, NATIONAL RELIGIOUS BROADCASTERS; HENRY J. CAUTHEN, PRESIDENT AND GENERAL MANAGER, SOUTH CAROLINA ETV COMMISSION; AND STEPHEN R. EFFROS, EXECUTIVE DIRECTOR, COMMUNITY ANTENNA TELEVISION ASSOCIATION

Mr. **Wheeler**. Thank you very much, Mr. Chairman.

The National Cable Television Association made commitments over a year ago to support the compromise embodied in H.R. 5949, and we stand by those commitments. We do feel obligated, however, to inform the committee of events which have taken place since House passage of this measure which strike at the bill's very underpinning and would be harmful to cable consumers.

The Copyright Royalty Tribunal last month dramatically increased the rates paid by cable operators for distant television signals added as a result of the FCC's 1980 decision in favor of greater viewer options for consumers.

That the Tribunal may adjust rates is not in doubt. There were, however, three very negative effects resulting from the wholly unanticipated size of this rate adjustment. First, the Tribunal reversed de facto the existing communications policy favoring expanded choice for consumers. Secondly, it removed the underpinnings of the three-industry compromise which is at the heart of this piece of legislation. Third, it created a situation where 28 days from today on January 1 the channels which millions of cable subscribers watch are going to disappear from their sets.

Why is this so? Let us look at this first chart. The FCC's cable deregulation decision affirmed in the *Malrite* case allowed cable operators to expand viewer choice by bringing into their market an unlimited number of television signals from distant cities. The decision also eliminated the rules which force cable operators to black out on the imported signals syndicated programs being shown by local broadcasters.

The compromise embodied in H.R. 5949 is a simple trade between the two gains resulting from the FCC's decision. Simply put, we swapped the maintenance of a compulsory license to carry an unlimited number of signals for the imposition of expanded exclusivity. That was a trade which deeply divided the cable industry, as you will hear today. Nonetheless, it was a trade to which NCTA agreed.

The Copyright Royalty Tribunal has priced those additional distant signals so high as to make them valueless to the cable operator. As such, cable operators intend to drop the expensive distant signals on a massive scale on January 1. The net effect of this, unfortunately, is to deny consumers the diversity which they have been receiving since the FCC's deregulation; in short, to reverse communications policy.

Not only is this decision by the Tribunal an assault on consumers, it is an affront to the Congress. The Tribunal's recent decision ignored the standards which Congress established for such an adjustment in the 1976 Copyright Act. One of those standards is to consider the impact of the decision on the users of the product. There can be no doubt that the consumer will be heavily impacted negatively by the recent decision, and the Chairman of the Copyright Royalty Tribunal said so the day after the decision in an interview with the Washington Post when he said, "We think it is reasonable that they drop some distant signals they are now carrying."

The Tribunal further ignored Congressional standards which established the declining marginal value of each signal. On this chart the blue stair-step line is the statutory rate schedule in the 1976 act. This reflects the reality that the second set of signals is worth less than the first, the third less than the second, and so on.

Superimposed over that statutory standard, however, is the recent Tribunal decision. Rates have been set so high as to bear no relation to the earlier stair-step, and the new rates ignore the statutory concept of declining marginal value by establishing one rate for all new signals.

The net effect of this action is to price distant signals above their value, thus forcing cable operators to drop the signals and thus forcing consumers to lose services they have come to expect and enjoy.

I invited the other parties to the compromise on H.R. 5949 to meet earlier this week to explore how we could mitigate the impact of the Tribunal's actions via this legislation. We discussed a solution which the National Association of Broadcasters feels it can support, but which the Motion Picture Association does not. It is painful for me to suggest a further compromise to this bill, but we are grateful for NAB's support.

As we discussed, the Tribunal's rates are unconscionably high. Those rates, however, will be affected by the passage of this bill. As a result of passage, yet another rate proceeding will be triggered at the Tribunal to take into account the reimposition of syndicated exclusivity. That imposition reduces the value of signals and thus their rates.

Rather than raising the rates in January, forcing cable operators to drop signals and then reducing the rates 12 months later, does it not make more sense to put the previous rate decision and the newly required rate decision into one proceeding and have an orderly, reasoned adjustment?

Specifically, we would propose that you stay the implementation and effective date of the recent Tribunal rate decision pending the outcome of the rulemaking triggered by this bill, which we would suggest begin no later than June 1, 1982; and that the resulting new rates become effective with the first semiannual accounting period occurring at least 90 days after the final decision.

Furthermore, we would urge strong and specific report language to the effect that the rate adjustment for distant signals should take into account the imposition of exclusivity in this bill, the declining marginal value of incremental distant signals, and the effect of exclusivity on the value of additional signals.

Mr. Chairman, if I can for 1 second—Mr. Fritts, from the NAB, is here.

Eddie, is that a fair assessment of what we had agreed to in our compromise?

Mr. **Fritts**. Yes; it is.

Mr. **Wheeler**. Finally, and with respect for your time, Mr. Chairman, let me reiterate what I said at the outset. We gave our word in support of H.R. 5949, and our word is good. We call your attention, however, to the disastrous impact on consumers resulting from the Copyright Royalty Tribunal's decision. We have tried to work out an acceptable compromise to mitigate the Tribunal's impact on consumers. We will rely on the wisdom of these committees as to the appropriate action in that matter.

[The statement follows:]

STATEMENT OF THOMAS E. WHEELER, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION

Thank you, Mr. Chairman, my name is Thomas E. Wheeler. I am President of the National Cable Television Association, representing over 2,000 cable systems throughout the United States. I appreciate the opportunity to appear before you to comment on H.R. 5949, the cable copyright compromse.

As you know, the National Cable Television Association was one of the three parties which negotiated the original compromise agreement which became H.R. 5949. We believed that the final form of the bill balanced—albeit somewhat uneasily—the interests of our respective industries: cable, broadcasting, and program production.

Since the time we initially reached our uneasy accord, however, major changes have occurred in the regulatory landscape—changes which, when coupled with this bill, have significant negative effects on the cable industry and its subscribers.

First, the original agreement was amended by the public broadcasters and religious broadcasters so as to force cable operators to carry local broadcast signals which have nearly non-existent viewership (1-2 percent of viewers). By using up channel capacity with programs no one watches, cable subscribers are deprived of the ability to see the unique programming available nowhere else but on cable. Yet, even after adding the burden of these "viewerless channels" to the orginal compromise NCTA maintained its support of the agreement.

Next, in the *Eastern Microwave* case[1] the Court of Appeals agreed with a provision in H.R. 5949 and denied the liability of secondary transmitters. While this was precisely the finding the cable industry had hoped for, it lessened our need to support H.R. 5949. Still, however, we continued our support.

Then, on October 20, the Copyright Royalty Tribunal (CRT) issued its decision in response to the FCC's 1980 decision to deregulate distant signals[2] and syndicated exclusivity.[3] The action of the CRT was so extreme as to thoroughly and substantially eliminate one of the major rationales for our support of H.R. 5949. In what can only be termed a reckless decision, the Tribunal set the rates for the additional signals permitted as a result of the FCC's action at such an exorbitant level that the signals are virtually beyond the financial reach of most cable operators. Thus the major benefit the cable industry and its subscribers achieved in H.R. 5949—the compulsory license to carry as many distant signals as desired—was heavily damaged. And what consumers and operators had sacrificed—our freedom from the onerous burden of syndicated exclusivity—remained.

We knew, of course, that the Tribunal would make some adjustment in the rates to accommodate the alleged impact of the FCC's deregulation on the value of distant television signals. No rational person could have expected, however, that the tribunal would abandon its legislative guidelines, abuse the public interest, and presume—in a *de facto* manner—to reverse communications policy.

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[1] *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.* (2nd Cir., Oct. 13, 1982).

[2] Distant signals are television broadcast signals which originate outside of the cable operator's market and are not readily available off-air in that market. He thus imports them via terrestrial microwave to enrich the programming options of his subscribers.

[3] Syndicated exclusivity refers to the right of local independent broadcasters to order cable operators to black-out programming on distant signals to which the local broadcaster's showing of the fare, and thus allow him to maintain higher advertising rates than he might otherwise be able to demand. Nonduplication provisions provide networks the same protection.

There is in the law, as you know, the doctrine of changed circumstances. A contract can be vacated if the circumstances upon which it was predicated have materially changed. We believe this is the fact regarding H.R. 5959.

And yet, NCTA gave its word to the other parties and to Members of Congress to support this legislation, and we stick by that commitment. We are here today to grit our teeth and live up to that commitment to support H.R. 5949.

At the same time, however, it is only responsible that we call to your attention the immense anti-consumer impact of the CRT's decision and urge on behalf of our subscribers that if that impact is to be mitigated, H.R. 5949 is the appropriate vehicle. H.R. 5949 is the only vehicle available to stop consumers from turning on their sets to find that the channels for which they are looking are gone.

In conjunction with the National Association of Broadcasters, NCTA has a recommended solution to this problem—a stay of the CRT's decision pending the Tribunal resolution of the rate adjustment which this bill would mandate. NCTA and NAB will provide specific language to the committees. Although NCTA and NAB have agreed to an amendment to this effect, MPAA has not. The reason for adopting the amendment, we believe, is obvious—to stop consumers' screens from going blank twenty eight days from now; to allow subsequent adjustments mandated by this bill to have effect; and to permit an orderly preparation for whatever impact the CRT's final decision may have.

Mr. Chairman, we made an agreement and will honor it. We could not in all good conscience, however, mislead you, through our support of H.R. 5949, into believing that the bill would not, as a result of the CRT's decision, have a substantial negative effect on consumers. We believe the NAB has acted honorably and sensibly on this matter in an attempt to lessen its negative consumer impact. We will leave to your good judgement the determination as to whether or not the NAB/NCTA solution to the problems created by the bill and the CRT's actions is warranted.

THE COPYRIGHT ROYALTY TRIBUNAL DECISION

The Copyright Act of 1976 reversed two Supreme Court decisions[4] and provided that cable operators do, indeed, incur copyright liability when they retransmit distant signals. The Act created the Copyright Royalty Tribunal for the purpose of adjusting the copyright rates established in the Act to account for 1) national monetary inflation or deflation and changes in the average rate for basic service in order that the real constant dollar level of the royalty fee per subscriber "which existed as of the date of this Act" be maintained and 2) changes in FCC rules permitting the carriage of additional signals.

There are two key components of the rate-making structure within which the Tribunal is directed to operate.

Always, the Tribunal must recognize a rate schedule for distant signals based on *the declining value of successive distant signals*: a second distant signal is less valuble than the first, and a third is less valuable than the second. This principle was not foisted on the House Judiciary Committee by the cable industry; it was recognized by all parties at the time and subsequently. In a statement submitted to the CRT on September 14, 1981, by the Motion Picture Association of America, for instance, the Association stated:

As should be expected, the value of an imported signal is diminished as more similar signals are carried over the air or as more are imported; thus in a market having three networks, the value of another distant network signal is less than the value of that network station as a new distant signal to a market where the new station does not duplicate existing service. MPAA Comments, Cable Television Royalty Adjustment Proceeding, Docket No. 81-2, September 14, 1981.

And in June of 1982, an economic consultant testifying on behalf of professional sports in the matter of the most recent royalty fee adjustment, commented that the 1976 schedule "reflected a feeling that . . . the additional signals are worth less. The first imported signal is worth more than the fifth or the sixth . . . (T)hat is why the . . . rates declined." Hatfield testimony, Cable Television Royalty Fee Adjustment Proceeding, Docket No. 81-2, June 29, 1982.

The other aspect to note well regarding the formula of the 1976 Act was that although FCC regulations limited the number of distant signals which could be imported at that time, the fee schedule's regressive character contemplated and made provision for rates to be paid on a limitless number of distant signals. In 1976, the cable operator paid .675 percent of gross basic revenues for the privilege for importing his first distant signal; .425 percent of gross for introducing his second, third, and fourth signals; and .200 percent of gross basic revenues "for the fifth distant signal equivalent and each additional distant signal equivalent thereafter." 17 U.S.C. Sec. 111(d)(2)(B)(iv).

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[4] *Fortnightly Corp.* v. *United Artists Television, Inc.* 392 U.S. 390 (1968); *Teleprompter Corp.* v. *Columbia Broadcast System, Inc.* 415 U.S. 394 (1974).

The second ground rule for the Tribunal to observe in the particular instance of rate-making subsequent to a change in the FCC's distant signal policy is that the rate change should be predicated on, "among other things, the economic impact on copyright owners and users." 17 U.S.C. 810(b)(2)(B).

In 1980, the FCC did deregulate the carriage of distant signals. 79 F.C.C. 2d 652. Its decision was upheld in *Malrite T.V. of New York, Inc.* v. *F.C.C.*, 652 F.2d 1140 (2d Cir. 1981).

Regarding distant signal carriage, the Commission noted:

> [W]e believe that relaxation of our distant signal carriage restrictions will promote substantial improvements in television service to the public without causing any significant risk of loss of the existing levels of service provided by local television broadcasting stations. We have found . . . that competition from cable television has improved television service to the public and will continue to do so in the future. More specifically, in terms of the criteria for evaluation of these rules . . . we do not believe the elimination of the rules will have undesirable distribution or external effects and we believe their elimination will promote the welfare of consumers generally. 79 F.C.C. 2d 746.

Regarding elimination of the onerous syndicated exclusivity provisions, the Commission noted:

> [W]e remain confident that the public will be better served without the syndicated exclusivity rules. . . .
>
> [W]e must emphasize that the syndicated exclusivity rules impose substantial welfare costs upon the subscribers and potential subscribers of cable television service . . . [and] . . . violates a basic efficiency criterion of modern welfare economics. The resulting welfare loss to cable subscribers is substantial. . . . [W]e concluded that the maintenance of the syndicated exclusivity rules would provide no improvement in the television service provided by local stations. . . . Ibid. at 754, 749.

In eliminating its distant signal and syndicated exclusivity provisions, the FCC effected public policy in the realm of communications, the task it was authorized to do in the Communications Act of 1934. It was the opinion of that expert body that the public would be better served by allowing cable to introduce a wealth of distant signals into communities, and that the option to do so should be opened. And it saw that the revenues of broadcasters and program producers were secure enough to withstand the negligible impact of duplicate programming in their respective communities.

NCTA PETITIONED CRT TO INSTITUTE RATE ADJUSTMENT PROCEEDING

It was against this particular landscape that the NCTA, in August, 1981, petitioned the Copyright Royalty Tribunal to ascertain what rate adjustments, if any, ought to occur as a result of deregulation. We expected—at the most—a reasonable upward adjustment of the rates according to the formula of declining values that had been in effect since 1976.

Our expectation was not unreasonable. Not only had the formula been established after careful consideration, but it had withstood the fire of a 1980 rate adjustment proceeding in which the rates were adjusted upward for inflation but the concept of declining marginal value was maintained intact. More critically, scores of cable operators had made programming and financial decisions in reliance on that formula, introducing hundreds of distant signals to communities heretofore denied them. And in reliance on that formula cable operators had entered into franchise agreements with the governments of their respective communities.

It was also in reliance on the scheme contained in the Copyright Act that the NCTA entered into the negotiations with the NAB and the MPAA which resulted in the present legislation, H.R. 5949. After much soul searching and great division within this industry, we agreed to the reinstatement of syndicated exclusivity as a *quid pro quo* for the maintenance of the compulsory license for an unlimited number of distant signals.

THE CRT AND ITS IMPACT ON THE CABLE INDUSTRY

Barely had the cable industry closed its eyes for a fitful rest after the labor of producing H.R. 5949, than it awakened on October 21, 1982 to an entirely new landscape. The Copyright Royalty Tribunal had abandoned the statutory concept of declining signal value, and instead imposed a flat rate for all signals which operators could import as a result of deregulation. A flat ratae that exceeded by nearly 400 percent the highest existing rate, and by nearly 1,500 percent the lowest prevailing rate! Furthermore, to compensate copyright owners for injuries they alleged that they might suffer as a result of lifting of the syndicated exclusivity provisions, the Tribunal imposed a surcharge on the rates charged for signals allowed prederegulation! The rate for new signals effectively destroyed distant signals as a programming option—in disregard of common sense, economic realities, regulatory history, the FCC's carefully considered policy of abundance, and, indeed, the plain rationale of the Copyright Act.

What will be the impact of the CRT's decision?

Consumers will be harmed directly because many cable operators will be forced to drop distant signals. Listen to these facts taken from some affidavits submitted by multiple cable system operators (MSO's).

American TV and Communications Corp., the nation's second largest cable operator, serving over two million subscribers, reports that unless the CRT decision is vacated, it will drop three to five distant signals for its 20,000 subscriber Erie, Pennsylvania system; three to four distant signals from its 25,000 subscriber system in Rochester, New York; and one superstation from its 11,000 subscriber St. Louis County system.

Amos Hostetter, Jr., President of Continental Cablevision, with 575,000 subscribers, reports:

If forced by the CRT's massive rate increase to make decisions . . . Continental probably will drop the majority of its distant signals. If other cable operators do the same—as I expect they will—the net result will be a regrettable loss of program diversity and what amounts to CRT repeal of the FCC's deregulatory initiatives.

Gustave Hauser, Chairman of Warner Amex Cable Communications, serving over one million subscribers, notes that in one of Warner Amex's major systems, copyright royalties will increase by "more than 500 percent" and adds "it will be economically prohibitive for us to absorb these enormous increases . . . (Thus) we may be left with only one practical option—to delete distant signals. . . ."

The Vice President for Sales and Marketing for Turner Broadcasting System, Inc., owner of superstation WTBS, Channel 17, Atlanta, one of the country's most popular distant signals, currently reaching 23.3 million subscribers, states:

[I]t appears that cable systems serving between one and two million subscribers will terminate transmission of WTBS' signal by January 1, 1983, the effective date of the CRT's decision, in order to avoid increased copyright royalty liability incurred under that decision.

Consumers will also be harmed where the operator cannot drop distant signals, for the burden of these additional unwarranted expenses will necessarily result in detriment to the operator's service. Perhaps it will mean the operator has to discontinue providing made-for-cable programming; perhaps it means a reduction of his commitment to local origination, or public, educational and municipal access development; perhaps a decline in technical standards; perhaps a loss in the quality of service.

How much money is involved? Acting Tribunal Chairman Thomas Brennan said that if operators retain their present load of distant signals, these percentages translate into an annual increase of $15 million to $20 million for the industry over and above the $29 million the industry currently pays in copyright fees.

What does it mean on the level of single MSOs, and individual cable systems? Daniel Aaron, Senior Vice President for Comcast Corporation, says that in one system "fairly representative of Comcast's overall system mix," the present payment of $14,000 would be increased by $54,000, bringing the total copyright payment to $68,000. Payments from all of Comcast's cable systems would increase from $135,000 to $700,000 or more.

General Electric reports that the impact of the increases on operating systems for the year 1983 would be on the order of $1,350,000, "an expense the Company absolutely cannot afford to incur."

Group W reports "the rule change will have a very substantial immediate adverse financial impact of several millions of dollars. . . ."

In many instances, the operator cannot drop a signal without notifying his franchising authority, and often he must obtain specific permission from that authority to drop a signal. Obtaining permission invariably requires a good deal of time, during which time the operator will have to absorb his increased rates. If the franchising authority refuses to grant permission to delete the signal, the lesser quality of the system will be a permanent fact of life.

Permanent, that is, until franchise renewal, when those factors will militate against the operator's renewal. This is a particularly sensitive issue just now when a great many of the "first round" of franchises—those issued in the 1960s—are expiring, and when operators must put their best foot forward if they expect to hold onto their systems.

The operators' likelihood of gaining renewal is threatened not only by their requesting permission to drop popular, but now altogether too expensive distant signals, but by their trying a second approach: requesting a rate increase to cover the newly-imposed costs. Rate hearings are difficult proceedings from a practical and public relations standpoint. Too, they are if anything, lengthier proceedings than proceedings regarding signal carriage. Cable operators point out that rate hearings run anywhere from two to nine months, on the average, with some proceedings going on for considerably longer.

The operator's position is particularly hopeless as the Copyright Royalty Tribunal declared the effective date of its decision as January 1, 1983. Virtually no hearing on program alternatives, and certainly no rate hearing could be accomplished in the period between the CRT's announcement on October 20, 1982, and the effective date. Inevitably, operators carrying distant signals will face increased costs not only for the new signals they introduced as a result of the FCC's 1980 policy decision, but on the previously allowed distant signals.

For all these reasons, NCTA has moved for a stay of the rate increases pending judicial review in the U.S. Court of Appeals, D.C. Circuit.

THE CRT'S DECISION: CALLOUS AND CAPRICIOUS

The Copyright Royalty Tribunal showed callous disregard for the millions of cable subscribers who have become accustomed to a wealth of broadcast signals, for the Tribunal knew full well that operators would drop signals rather than pay the exorbitant new fees. ("We are told that cable operators would not pay the copyright fees proposed by the copyright owners, but elect to drop distant signals. . . ." 47 Fed. Reg. 52153). On the day after the decision, Thomas Brennan, Acting Tribunal Chairman, told the press "Now, for the first time, they have to place a reasonable marketplace value on the programming, and we think it's reasonable that they may drop some distant signals they are now carrying, particularly since so many other sources are available to them." The Washington Post, October 22, 1982, C14.

There is nowhere in the decision any evidence of respect for the standards adopted by Congress in the 1976 Copyright Act.

First, the Tribunal dismisses the carefully conceived formula of declining value, commenting, casually, that "much larger issues rendered moot the issue of whether or not additional distant signals decline in value." 47 Fed. Reg. 52155. Those "larger issues" are never defined.

Second, the Tribunal failed altogether to conform to the Congressional mandate to predicate rate adjustments on "among other factors, the economic impact of copyright owners and users." 17 U.S.C. Sec. 810(b)(2)(B). Instead by its own admission, the Tribunal used as its only standard the market expectations of the copyright owners. 47 Fed. Reg. 52153.

Furthermore, the Tribunal's proceeding was conducted without regard for the public policy expressed by the Federal Communications Commission in its deregulatory action. The Tribunal acknowledges no responsibility to conduct itself according to that expressed policy. Incredibly, the Tribunal states:

"We observe that the Congress has not assigned to this body the determination of national policy as to fostering of various competing methods of transmitting programs to the public. If the payment of fees based on the reasonable value of the programs causes operators to drop distant signals with resulting adverse public policy consequences, the Congress may wish to consider if some form of assistance to the cable industry is appropriate. Clearly that is not the function of the Tribunal or copyright owners." *Ibid.*

CRT INVITES CONGRESSIONAL REVIEW

The CRT itself has opened the door to Congressional review of its action, particularly insofar as it may adversely affect consumers. Such a Congressional review could impose standards upon the Tribunal which could guide it in a reconsideration of rates which would be appropriate in light of the F.C.C.'s policy of abundance, and the provisions of H.R. 5949. Those standards could be, for instance:

Reasonableness in light of the economic impact on copyright owners and copyright users, as required in the Copyright Act. 17 U.S.C. Sec. 801(b)(2)(B).

Adherence to the principle of the declining value of distant signals, which was recognized in the Copyright Act and upheld in the 1980 rate adjustment proceeding.

An awareness of the impact of rate adjustment on the consumer of cable services.

Most inportant, however, is the opportunity which Congress has to mitigate the adverse consumer impact of the CRT's decision. As indicated previously both NCTA and NAB support a legislative stay of the CRT's decision pending the outcome of the proceedings required by H.R. 5949.

ADDITIONAL AMENDMENTS MUST BE RESISTED

We are aware that a number of organizations have approached Senators in an attempt—however belated—to gain special treatment in this bill. Along with the other parties to the accord, we vigorously oppose all such amendments.

Many of the petitioners who seek inclusion in this bill want to expand the must-carry requirements of operators to carry their particular channels. I can understand why they would like mandatory free ride on cable systems, but a public policy justification does not exist. Remember what we're dealing with in copyright law—property rights, and the protection of property rights.

A cable operator's channels are just as much "property" as are the films and syndicated properties of which everyone is so protective. The cable operator invested money, talent, and hard work to create the "property" which is his cable system. This property should not be taken away by government and given, for free, to others, thus denying the operator the use of his own property.

THE DBS DEMAND FOR MUST-CARRY STATUS

The first group of petitioners are from the Direct Broadcast Satellite Consortium.

Direct broadcast satellites are high-powered satellites that beam 3-5 channels of video fare directly to small dishes in subscribers' homes, without the intermediary of a broadcast television or cable system. The signals are sent down in scrambled form, and unscrambled by means of a minicomputer installed in the subscriber's home. The first DBS service is expected to start up in late 1983.

Cable television systems are specifically freed from the obligation of carrying direct broadcast satellite signals by the provision of Sec. 341(b)(2) of the bill. They are freed, generally, from carrying a broadcast channel which transmits more than 50 percent of subscription programming by Sec. 341(g)(3). The fact that these specific exclusions were made indicate that the House considered and rejected must-carry status for satellite TV.

The fact of the matter is that DBS does not conform in any way to the factors which underlay the FCC's 1965 decision to require cable operators to carry local broadcast signals. In the First Report and Order (April 22, 1965) the Commission emphasized its obligation to the nation's free broadcast television system,[5] and to the system of local television broadcasting.[6]

DBS is hardly free. General Instrument, manufacturer of reception equipment for United Satellite Television, estimates that the dish, receiver, and controller/decoder will cost each subscriber between $700 and $750. Furthermore, only individuals with space for the dish will be able to utilize the service, and space costs a great deal nowadays.

Secondly, DBS has nothing to do with localism. Signals will reach enormous portions of the country, and, indeed, will spill over our borders.

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[5] "Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis. . . . This obligation is not by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of service." First Report and Order, April 22, 1965, para. 44.

[6] "Moreover, stations afford a means for community self-expression. They provide programming designed to meet the particular tastes and needs of the public in their service area, such as local news and public affairs, and are accountable to the Commission for operations in the public interest." First Report and Order, April 22, 1965, para. 45.

DBS has a place in the national communications system. Its biggest asset is that it circumvents local broadcasters and local cable operators and goes direct to consumers. Isn't it kind of perverse that a system designed to bypass the local cable system should now be demanding free access from the channels on this system?

Why should the government grant special status to this medium which is nothing more than a way of circumventing local broadcasters and local cable operators?

THE LOW POWER PLEA FOR MUST-CARRY STATUS

Equally unfounded are the claims of a second group of would-be piggy-backers: the low power television broadcasters.

Again, the fact that this group has been specifically denied must carry status in H.R. 5949 (Sec. 341(b)(1)(B)) is strong indication that the merits of the situation were examined, and the claim denied. Re-opening the issue for a moment, the weakness of their claim is readily apparent.

Low power television is a broadcast signal with short arms. It can only embrace a portion of a fair-sized town, a neighborhood perhaps. It is thus uniquely suited to serve the most specific needs of communities, and, indeed, this was the hope of the FCC in authorizing the low power option.

The FCC considered whether or not LPTV should have must-carry status. The FCC rejected must-carry on the grounds that "it is not in the public interest to extend . . . (must carry status) . . . to low power stations. Low power stations are not subject to the programming obligations with regard to the community of license that form the basis for our requiring carriage of full service stations. Additionally, it will not further our goal of fostering a fully competitive telecommunications marketplace if the Commission, by regulation, injects itself between the parties to what should be a private decision-making process. The cable operator, on the basis of his own assessment of marketplace conditions, not the FCC, should decide what programming a cable system will carry, beyond that required by our present carriage rules . . . (W)here low power must compete with other program sources for cable carriage, absence of 'must carry' protection could be a spur to low power's provision of creative, innovative programming. This also may encourage low power applicants to seek out remote, unserved areas where cable is thought not to be viable economically, and thereby to fill gaps in existing television coverage, a function for which low power stations are uniquely suited." 96 Fed. Reg. 21492.

Consider, too, the practical matter of the sheer number of low power television stations which are in the offing. Although only 118 LPTV stations had been licensed as of September, 1982, and only 207 construction permits had been awarded, there were 6,306 applications pending. Even if—as anticipated—only 1,500 licenses are granted, can you imagine the impact of "must carry" status on the cable industry? Particularly on those small systems with limited channel capacity in the rural areas which were supposed to be the site of most of the LPTV activity?

THE NON-DILEMMA OF THE SPANISH-LANGUAGE BROADCASTERS

A third group that comes forward at this late date to ask for special privilege via this piece of legislation is the Spanish-language broadcasters. They claim that substituting a 1-2% test of viewership in place of the geographical basis for must carry status will allow a great many cable operators to drop their signals, because the traditional ratings services, Arbitron and Neilson, do not measure the viewing habits of Spanish-speaking homes with any accuracy.

Our first response to this group is that H.R. 5949 does not restrict a broadcaster to Arbitron and Neilson. He is free to utilize any rating service he chooses. Congressman Robert Garcia (D.-N.Y.), in debate offered on the House floor on September 28 of this year, pointed out that Spanish International Network has employed an alternate ratings service, Strategy Research Corp, for 18 years. This ratings service has provided SIN with ratings three to ten times higher than those offered by Arbitron and Neilson.

On this issue, I remind the committee members that all broadcasters must have a fairly accurate gauge of their audiences in order to justify their rate cards. The fact that these Spanish-language stations are operating is proof that there is an audience for their programming. Where do their numbers come from? Let us see them. As I said: H.R. 5949—in recognition of this problem—did not limit broadcasters to the use of any specific ratings services.

Secondly, even if a Spanish-language station cannot prove its entitlement to must carry status, the fact that the new rules will allow cable systems to unburden themselves of so many little-viewed stations actually increases the likelihood that they will carry a station for which their appears to be a strong, identifiable consistuency, such as a Spanish-speaking population.

Third, if there is such a constituency in the community, and the operator has been carrying programming of interest to them all along, such as a Spanish-language station, he would be reluctant to drop it in the face of the community's expression of interest, regardless of how poorly the channel does in the ratings.

Fourth, although an operator drops a Spanish-language broadcast station, he might well choose to replace it with Spanish International Network or Galavision, two highly regarded Spanish-language satellite networks.

THE DEMANDS OF PROFESSIONAL SPORTS OWNERS

The fourth group that asks special treatment in H.R. 5949—the representative of professional sports—were sent packing by the House committees after their arguments were repeatedly rebuffed. And no wonder. Their demands are the most excessive and the least meritorious of all.

There are three reasons why the demands of professional sports owners should be rejected.

First, their demands are far outside the scope of H.R. 5949.

Second, the owners cannot produce a factual foundation to support their protectionist demands.

And third, if their demands are met, the benefits would accrue only to the owners, at the expense of the sports-watching public.

OWNERS' DEMANDS EXCEED THE PROVISIONS OF H.R. 5949

The compromise embodied in H.R. 5949 is very limited in scope. It essentially restores the status quo as it existed prior to July 1, 1981, when a federal court upheld the FCC's decision to eliminate the syndicated exclusivity and distant signal rules.

Consider what the broadcasters and program producers had, and would regain under H.R. 5949:

Movies: Before July 1, 1981 a broadcaster could demand exclusivity within his market for cable carriage of movies to which he owned the rights; he could not exclude movies to which he did not own the rights. This policy is reinstituted by H.R. 5949.

Syndicated Series: Prior to July 1, 1981 the broadcaster, within his own market, could claim exclusivity on any series to which he had purchased the rights—but not those for which he didn't own the rights. H.R. 5949 restores his right.

Under current FCC regulations, sports owners have the right to compel cable systems within a 35 mile radius of the playing field to black-out their games on the day they are played, unless they have sold broadcast rights to a local station which the cable system carries under the FCC must carry rules. H.R. 5949 would codify this right.

What the sports owners want, however, is substantially more. They want territorial exclusively—the right of a home team to prohibit cable television subscribers in a 35-mile radius of the stadium from viewing any other game of the same sport on days when the home team is playing. Thus, in Los Angeles, 828,000 homes would not be able to view the White-Sox Orioles game on the day the Dodgers were in Dodgers stadium; nearly 2,000,000 New York area households would be deprived of the Canadiens-Bruins game when the Rangers were in residence; and 783,600 cabled San Francisco homes could not view the 76ers-Celtics game when the Warriors went into home-town action!

They are asking for something entirely new in copyright law: the ability of a third party to control (exclude) properties it does not own—i.e. the broadcast rights of other teams. No such privilege has ever been granted, and certainly the other parties to H.R. 5949—movie producers and the producers of syndicated programming—do not gain such extraordinary protection under this legislation.

THERE IS NO FACTUAL BASIS FOR THE SPORTS OWNERS DEMANDS

Professional sports owners are unable to prove that cable television has harmed them in a manner sufficient to justify the restrictions they request. They allege that cable has cut attendance, ignoring the evidence that home attendance has increased even while cable penetration has grown. They allege that cablecasting of sports events reduces the amounts they can command for broadcast rights to their games, even while those figures are skyrocketing.

Baseball teams, in particular contend also that weak teams are hurt by cable's importation of games between stronger teams—an assertion they are unable to prove—yet the major league owners refuse to take steps which could restore a better competitive balance to the league. The National Football League teams, for instance, pool their broadcast revenues and divide them among the league teams. As a result, teams have the financial wherewithal to improve upon bad seasons. But baseball owners hoard every penny of their broadcast revenues for themselves so the rich get richer and the poor stay poor.

The baseball owners have it within their own ability to remedy or mitigate the problem (if any) which they claim occurs as a result of relative team weaknesses or strengths. Beyond this fact, however, I believe the actions of baseball owners have shown the "bringing in a game by cable hurts my gate and broadcast revenues" argument to be specious.

If showing a competing game is so damaging, why is it done all the time in cities with two baseball teams? Awhile back, while in Los Angeles, I happened to notice that LA baseball fams could watch both the Dodgers (who were away) and the Angels (who were home) on traditional broadcast television. The sports-supported amendment proposed to H.R. 5949 in the Judiciary Committee, as a matter of fact, contained specific language to ensure that it could not be interpreted as prohibiting the kind of two game broadcast situation I just described. Now what I cannot understand is why there is no harmful impact in broadcasting both the away Dodger game and the home Angels game but somehow it is disastrous if the Braves or the Padres games come into the market on cable.

And while we're talking about inconsistencies, why is it that major league baseball allows the television networks to bring a baseball game into a market where a live game is being played, but describe it as "disastrous" for a cable operator to do the same thing? Let me be specific. H.R. 5949 and the NBC Game of the Week contract are identical in effect: both prohibit the showing of the same game in the market in which it is being played while permitting another game to be shown. The existing network contract, as a matter of fact, requires the network to substitute another game when the primary game is blacked out. This isn't good enough where cable is concerned, however, the baseball owners want to black-out all games. Just like in the previous example, I cannot understand why it isn't harmful to bring in the network's backup game but it is harmful to bring in a game via cable.

SPORTS FANS BE DAMNED!

What the team owners are agruing, of course, is that they are "harmed" if they don't get every conceivable penny from a controlled distribution of their product. In light of their steady progress towards that goal, it is not surprising that they should make this current demand for total control.

Over the years, the owners of professional sports teams have sought and received federal dispensation to arrange their affairs in a manner that would have been prosecuted under the Sherman Act had it been attempted by any other industry. In 1922, the Supreme Court permitted baseball teams to establish and enforce exclusive franchise areas. Consumers' sports options were further curtailed in 1961 when Congress amended the antitrust laws to permit the major sports leagues to collectively withhold, coordinate, and control the sale of their respective teams' broadcast rights. Now the owners are asking Congress that they be made the sole determiners of what games sports fans may watch on cable, where and when and how they watch them, and what the individual fan must pay. It's a classic squeeze play.

But who is being squeezed? The sports fan.

In 1922, his access to baseball was limited when the owners got the right to divide up the marketplace. Because the league could strictly control the number and location of its teams, our fan's ability to watch professional baseball was curtailed. Next, when broadcast television became widespread, and our fan had a technological method for balancing out of this contrived scarcity of pro games, the owners got the right to collectively determine broadcasting practices, again limiting the choices of our poor fan.

Note that this is unparalled outside of professional sports; if the movie producers, for example, tried to divide up markets geographically or agreed to restrict the distribution of their product, they would be found guilty of antitrust violations, as indeed they were in the recent *Premiere* case. In any event, having already gone most of the way towards restricting the availability of baseball, the major leagues now want to apply the squeeze through a special dispensation which provides that if our fan wants to see a baseball game on cable he can see only what the owners choose and at the price they name.

This is true despite the fact that professional sports owners are already being compensated several times over for display of their product: first, through ticket prices, which rose 31 percent from 1976 to 1980 notwithstanding the growth of cable; second, through increased attendance which rose 37 percent over the same period, notwithstanding the growth of cable; and third, through the sale of broadcast rights which have been dramatically rising notwithstanding the growth of cable; and fourth, through royalty payments from cable operators who retransmit broadcast signals on which sporting events are carried.

Why do the professional sports owners want this final public policy break? It's simple: Pay Television. The baseball owners want the right eventually to give the 90 million Americans in the 30 markets where there are professional sports franchises one and only one choice: Pay a fee to see the game in person or Pay a fee to see it either on cable or subscription television. They do not want even the minimal competition of other games which might be offered on a basic cable tier. I leave it to you to judge whether the public laws ought to be arranged to accomodate this end.

CONCLUSION

In conclusion, let me express my appreciation for the opportunity to present the views of the cable industry.

We entered into the agreement which resulted in H.R. 5949. We are honorable people who stand by our agreements. We do urge you to consider how the recent decision of the CRT, when coupled with H.R. 5949, will hurt consumers. We, along with the NAB, have suggested a solution to this problem and do urge its adoption. We further urge you to resist the temptation to add any other amendments to H.R. 5949. Any other such amendment would be the straw which broke the already overburdened camel's back and the cable industry would have no choice but to oppose the entire bill.

Thank you.

CRT REVERSED COMMUNICATIONS POLICY AND COMPROMISE BASIS

FCC DECISION/*MALRITE*

- UNLIMITED DISTANT SIGNALS
- ELMINATION OF SYNDICATED EXCLUSIVITY

MPAA/NAB/NCTA COMPROMISE

- BASED ON EXISTING COMMUNICATIONS POLICY
- COMPROMISE TRADE: *Maintain Compulsory License*

  Maintain Unlimited Distant Signals

  Lose Exclusivity (on expanded basis)

CRT ACTION

- MAKES UNLIMITED DISTANT SIGNALS VALUELESS
- REVERSES FCC/*MALRITE*

CRT DECISION RETARDS COMMUNICATIONS POLICY

ACTING CRT CHAIRMAN THOMAS BRENNAN:

> "... We think *it's reasonable that they drop some distant signals they are now carrying ...*"
>
> (emphasis added)
>
> *The Washington Post, October 22, 1982.*

CRT DECISION:

> "If the payment of fees ... *causes operators to drop distant signals* ... the Congress may wish to consider if some form of assistance to the cable industry is appropriate."
>
> (emphasis added)

CRT IGNORED COMMUNICATIONS POLICY & COPYRIGHT ACT

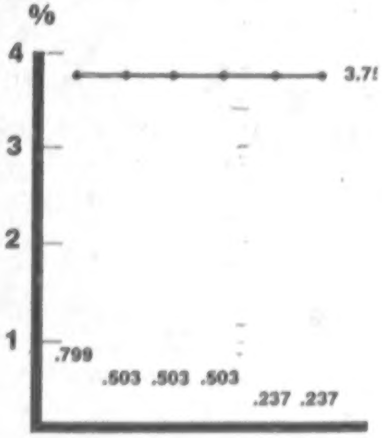
CONGRESS: Established a decreasing marginal value of additional signals.

Current Schedule:

1st DSE	.799
2nd - 4th DSE	.503
5th + DSE	.237

CRT imposed fee:

3.75% of Gross Basic Receipts for *each* additional DSE



CRT ACTED CAPRICIOUSLY

- Reversing Communications Policy
- Pricing Signals without regard for Consumers

  "We do not find ... justification for establishing royalty rates below reasonable marketplace *expectations* of copyright owners."

  (emphasis added)
- Encouraging elimination of existing services

MONTGOMERY COUNTY DISPROVES ESSENTIAL CRT CONCLUSION

- Splits System
- Increases Prices to Customers

- Violates Franchise
- Undermines Financial Viability of $100 million system

CRT DECISION IS ANTI-CONSUMER

- Increases Consumer's monthly bills

	Basic	Current Royalty	New CRT	Change
Rome, NY	$9.00	$ .14	$1.05	+650%
Syracuse, NY	$8.00	$ .22	$1.58	+618%

- Forces Violation of Franchise Agreements

Chairman PACKWOOD. Tom, thank you.

We will withhold on questions until we have finished with the panel.

Next, we have the new president of the National Association of Broadcasters, Eddie Fritts.

Eddie.

Mr. FRITTS. Thank you, Mr. Chairman. We deeply appreciate your holding these hearings.

As you know, our association's membership encompasses some 685 full-service commercial television broadcast stations and all of the commercial television networks. For the record, we have submitted a formal statement today outlining our support of the legislation. Being aware, of course, that your agenda is lengthy, I will briefly just touch on a few of the many reasons why the National Association of Broadcasters so heartily endorses passage of H.R. 5949.

For the past 20 years, the last two decades in fact, the broadcasting industry, cable television, and program production companies have been awash in a sea of unresolved and troublesome issues. We have been besieged by the on-again-off-again zigzag pattern of regulation which has produced constant uncertainty not only with our members but with the viewing public as well. This legislation will bring stability and sound public policy to the interrelationships of broadcasting, cable, and the program production companies.

This legislation embodies a historic compromise which has delicately balanced and is the culmination of nearly 2 years of difficult, arduous, and, yes, even sometimes bitter negotiations between the affected parties. The end result, we submit, is legislation that while not perfect is fairly balanced and which will allow each industry to develop its potential in the marketplace environment where everyone knows the rules.

The chief beneficiary of this legislation, however, will be the viewing public, because H.R. 5949 will assure the vitality of the broadcast, cable and production industries, and it will encourage maximum diversity of video programing sources.

This legislation is necessary to establish a comprehensive Federal policy which balances the competing interest of the cable industry, No. 1, and their retransmission of distant signals to their subscribers; No. 2, the broadcasting industry in assuring local television stations are afforded mandatory carriage over local cable systems and the ability to protect their program investments; and No. 3, the program production or syndication industry in obtaining adequate compensation for and protection of its products.

Chief among NAB's concerns addressed in this bill is the codification of the must-carry status of local television signals by cable systems in the same areas so as to assure the television stations' ability to continue and to expand their services to the communities to which they are licensed, and restoration of syndicated exclusivity which offers reasonable protections for negotiated agreements between broadcasters and program syndicators under which broadcasters pay for the exclusive right to show certain programs in their very own markets.

To obtain these objectives we have had to make substantial concessions of long-held and tightly embraced positions. For example, NAB has favored normal copyright liability for cable's use of distant signals. NAB has favored full must-carry status for all stations.

We would also question the applicability of the common carrier exemption in the copyright law to the so-called resale carriers which distribute distant signals to cable systems.

NAB recognizes, however, that in compromising these goals it will achieve not only the codification of must-carry and the reintroduction of syndicated exclusivity, but it will also gain the certainty and the stability which will result from the definitive resolution of a 20-year regulatory morass.

Again, I would point to the fact that this compromise has been delicately fashioned over almost 2 years of negotiations between the broadcasters, the National Cable Television Association, and the Motion Picture Association of America, and it carries the enthusiastic and widespread support of not only these groups but of the National Association of Public Television Stations, the National Religious Broadcasters, the Independent Television Association, to mention just a few.

Mr. Chairman, we respectfully urge the Senate vote promptly to approve H.R. 5949 which clearly serves the best interests of the viewing public, the broadcast, cable, and production industries.

Thank you.

[The statement follows:]

STATEMENT OF EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB), whose membership includes 685 television broadcast stations and all the nationwide commercial television networks, fully supports H.R. 5949 and urges the Senate to pass it at the earliest possible time. First, by following this course, the Senate would bring stability and sound public policy to the interrelationships of the broadcasting, cable television and program production industries, which for the past 20 years have been awash in a sea of unresolved and troublesome issues. Second, the legislation embodies a historic compromise which, by definition, requires each party to exchange some long-term goals for near-term gains and stability; by enacting it, the Senate would achieve major benefits for each of the affected parties. Third, and most important, it is the public which would be the principal beneficiary because the legislation would assure the vitality of the broadcast, cable and production industries and encourage macimum diveristy of video programming sources.

The legislation is necessary to establish a comprehensive federal policy which balances the competing interest of (1) the cable industry, in the retransmission of distant broadcast signals to their subscribers; (2) the broadcasting industry, in assuring that local television stations are afforded mandatory carriage over local cable systems and the ability to protect their program investments; and (3) the program production (or syndication) industry, in obtaining adequate compensation for and protection of its products. NAB perceives H.R. 5949 as providing this essential federal policy which accommodates each of these principal concerns within the framework of workable competition. Chief among NAB's concerns addressed in the bill is the codification of mandatory carriage ("must carry") of local television signals by cable television systems in the same areas, of local television signals by cable television systems in the same areas, so as to assure television stations' ability to continue and expand their service to the communities to which they are licensed; and restoration of reasonable protestions for negotiated agreements between broadcasters and program syndicators under which broadcasters pay for the exclusive right to exhibit programs in a particular ("syndicated exclusivity").

To attain these objectives, NAB is willing to make substantial concessions of long held and tightly embraced positions. For example, NAB has favored normal copyright liability for cable's use of distant broadcast signals. NAB has favored full "must carry" right for all stations. NAB would also question the applicability of the common carrier exemption in the copyright law to the so-called resale carriers which distribute distant signals to cable systems.

NAB recognizes, however, that in compromising these goals it will achieve not only specific objectives of codification of "must carry" and reintroduction of "syndicated exclusivity" protection, but will also gain the certainty and stability which would result from definitive resolution of a twenty year regulatory morass. Like the National Cable Television Association (NCTA) and the Motion Picture Association of America (MPAA), NAB appreciates the need to resolve the long-standing copyright and communications issues arising from cable's use of broadcast signals. As the existing legislative/regulatory scheme is "tilted" severely in cable's direction, NAB also sees the need for prompt action, attainable only if legislation enjoys the broad support which H.R. 5949 has. The price of that broad support has been compromise, often reluctant, but always realistic in light of the need to secure passage of legislation in this Congress.

THE NEED FOR PROMPT PASSAGE OF H.R. 5949: THE HISTORICAL BACKGROUND

H.R. 5949 is a tremendously significant piece of legislation. It comes in the wake of twenty years' uncertainty created by numerous unsuccessful attempts to resolve these issues.

Initially, broadcast stations enjoyed the ability of cable to provide reception of their signals in cases where terrain features prevented good reception of their off-air signals. As cable began to employ long-distance microwave links, broadcasters' delight with cable was replaced by concern that cable systems not only would provide better reception in fringe areas and other areas of poor reception, but also would import broadcast signals from distant markets into their local markets. The essence of broadcasters' concern was not fear of competition per se, but the ability of cable to use distant signal programming without having to enter the program distribution marketplace, bargain with the station or program owner, or pay anything, much less a marketplace price, for the programming. As one broadcaster observed at the time, broadcasters were being "shot with their own gun"—and were without remedy under an antiquated copyright law.

As anyone would have expected, and as all well know, the decade of the sixties found broadcasters seeking relief from the Congress, the Courts, and the Commission. In Congress, broadcasters sought modernization of the copyright laws to establish an equitable and truly competitive marketplace in which broadcasters could compete with cable. Program producers and broadcasters also sought interpretations of the 1909 Copyright Law which would have applied normal copyright liability to cable television. The Courts, however, deferred to Congress.

Meanwhile—and with some success—broadcasters urged the Commission to limit at least to some extent the free flow of broadcast programming used by cable systems to complete with broadcasters. If broadcasters could not compete with cable on an equitable basis, they at least wanted to prevent cable from exploiting its highly advantageous position to cripple and stifle the provision of broadcast service to the public.

The supposed resolution of the broadcast/cable competition issue was thrust upon the affected industries in 1971. The so-called "Consensus Agreement" developed by the Nixon Administration led to adoption of various rules by the FCC in 1972 and established of a compulsory license for cable carriage of broadcast signals in the 1976 Copyright Act. The FCC rules and the copyright compulsory license were designed to be complementary. The FCC rules effectively counterbalanced the compulsory license by limiting what otherwise would have been the unrestricted carriage of broadcast signals by cable systems at minimal, noncompensatory rates.

This complementary regulatory structure, however, had begun to disintegrate even before the 1976 Copyright Law was enacted. Within two years of the copyright law's effective date (January 1, 1978), the FCC deleted key regulatory provisions, gutting the regulatory structure envisioned by Congress and collapsing its counterbalancing effect. The specific rules involved had limited the number of distant signals cable systems could import and required cable systems to recognize and protect broadcasters' exclusive contractual rights to show syndicated programs (e.g., "M*A*S*H," "The Mary Tyler Moore Show") and feature films in their markets.

In the wake of the Commission's actions, broadcasters joined with program and motion picture producers to seek redress of the resulting and, in NAB's view, harmful imbalance. Ideally, NAB has favored full, normal copyright liability for cable carriage of distant signals and maintenance of the requirement that cable systems carry local broadcast stations (on a gratis basis). Ultimately, however, NAB has chosen to be realistic, and sought to resolve the dispute among the broadcast, cable, and program production industries through negotiation and compromise.

On September 28, 1982, the House of Representatives passed H.R. 5949, by a vote of 347–53. The bill embodies the agreed-upon compromise.

A REVIEW OF THE BASIC PROVISIONS OF H.R. 5949 DEMONSTRATES THE BENEFITS TO EACH OF THE AFFECTED INDUSTRIES

The following is a capsulization of the legislation H.R. 5949:

1. Codifies the FCC's rules requiring cable systems to carry local television stations, but with relief in markets where numerous off-air signals saturate cable systems to the exclusion of other services. Such so-called "must carry" rules have been maintained by the FCC in one form or another for over 15 years. A proceeding to provide relief for saturated cable systems has been pending at the FCC for several years.
2. Re-establishes in large measure the marketplace approach to cable use of syndicated programming by requiring cable systems to recognize broadcasters' contractual exclusive rights to show programs in their market. In short, broadcast systems again will get what they bargain and pay for in the marketplace when they purchase syndicated programs. A phase-in of syndicated program exclusivity, however, will provide cable systems and satellite distributed stations an adequate time to readjust to operating in the marketplace.
3. Codifies and strengthens to a limited extent current FCC rules insuring network affiliates' exclusivity in showing network programs in their markets. This rule, too, has been in effect in various forms for the past 15 years.
4. Codifies the rule enabling local sports teams to protect the local black-out of home game telecasts and restrict the area in which cable can use intercollegiate football games on fall Saturdays.
5. Preserves the core of the present scheme, the compulsory license and rate structure, with no limit on the number of distant signals which may be imported.
6. Clarifies the present copyright law exemption for common carriers so as to exempt resale carriers which distribute distant signals from liability.
7. Leaves intact the Copyright Royalty Tribunal's ability to adjust cable royalty rates to reflect changed market conditions.

These provisions embody a delicately balanced compromise among the major affected industries. Any amendment which shifts the balance of these provisions would endanger the broad support H.R. 5949 now enjoys.

PUBLIC BENEFITS OF H.R. 5949

By resolving complex issues of copyright and communications policy in a sound and sensible manner, H.R. 5949 benefits the consumer as well as the affected industries. A comprehensive, statutory package, H.R. 5949 does not depend upon coordination of Congressional action on copyright and regulatory action on communications issues, but will prevent the on-again, off-again, zig-zag pattern of regulation which has produced constant uncertainty for years. All concerned parties—broadcasters, cable operators, and the public—will benefit from stabilizing the regulatory framework in which the cable industry operates.

For example, investment decisions by broadcasters and cable operators, and franchise proposals by cable operators, could be based on certainty as to what the rules of the game will be. The public also will appreciate continuity in the programming which cable systems and broadcasters offer.

Specifically, the catalog of public benefits to be gained by the bill's enactment has four principal chapters. First, by codifying rules requiring carriage of local broadcast signals, H.R. 5949:

1. Promotes competition by preventing cable operators from insulating themselves from competition from local broadcast stations;
2. Assures the public continued access to the programming provided by stations licensed to serve their communities;
3. Maintains the ability of local stations to serve their communities and to compete in their local markets;
4. Maintains the diversity of free broadcast programming available not only to cable subscribers, but also to those who find cable unavailable, unaffordable, or unappealing, by insuring that lack of local cable carriage cannot sap the vitality of local stations; and
5. Enhances diversity by insuring the cable systems with limited channel capability are not "saturated" with "must carry" signals and may provide some nonbroadcast programming desired by their subscribers.

Second, by permitting broadcasters to bargain for and protect their exclusive rights to show synidicated programs and feature films in their markets, H.R. 5949:

1. Restores competition in the program acquisition marketplace by placing broadcasters and cable operators on the same competitive plane, enabling each to gain exclusive program rights against the other;
2. Assures a continuing and diverse supply of quality programming to broadcasters, cable systems, and other media (and ultimately to the viewing public) by permitting program producers to control use of their programs, and, thus, preserve their ability to seek a fair return on their programming investments, and
3. Enables broadcasters to provide attractive programming to cable and non-cable viewers by preventing duplication of their syndicated programming and feature films by cable systems in their markets, thereby protecting their investment in increasingly expensive syndicated programming.

Third, by codifying and strengthening FCC rules preventing duplication of network programming, H.R. 5949 preserves regional and national networking as a viable source of programming for broadcast stations. It thus assures the public will continue to enjoy top quality programming made possible by the economies of scale inherent in network arrangements.

Fourth, by continuing the compulsory license and basic fee structure, while imposing no limitation on the number of broadcast signals which may be carried by cable systems, H.R. 5949 enables cable systems to continue to provide the enhanced diversity of distant signal programming.

In short, H.R. 5949, besides meeting the vital needs of the broadcast, cable, and program production industries, is sound public policy. This sound resolution of the cable copyright problem and the attendant host of communications issues is long overdue and vitally necessary.

Much of the beauty and benefit of H.R. 5949 is in the fact that it exists, that significant troublesome issues have been resolved. Again, Congress is facing these issues now, only a few years after a new copyright law became effective, precisely because FCC actions could—and did—dismantle a regulatory scheme designed to complement the new copyright law. H.R. 5949, by providing for strictly statutory resolution of the issues, prevents recurrence of inconsistent regulatory action which might necessitate related changes in copyright law.

This resolution of troublesome issues is a delicate balance of competing interests, which several proposed amendments now threaten to destroy. The Senate should reject these amendments, both because they could unravel the historic compromise without achieving any corresponding public benefit, and because each of the proferred amendments lacks merit. A brief summary of these amendments, and the reasons for their rejection, follows:

(1) The Senate should retain the bill's exclusion of direct broadcast satellites (DBS) from "must carry" provisions.

Direct broadcast satellite (DBS) systems will provide national video programming services (via satellites in stationary orbits) which can be received by small dish antennas installed on individual homes. DBS applications given initial approval by the FCC will offer predominantly pay services. One applicant, United States Satellite Broadcasting (USSB), proposes to provide free advertiser-supported programming which either can be distributed by independent broadcast stations or picked up by individual home dishes.

(a) "Must carry" rules embody the FCC's longstanding policy of promoting and preserving the nationwide system of free over-the-air local broadcasting.[1] Mandatory cable carriage of DBS would not serve the purposes of those rules. DBS would provide a nationally-based, non-local programming service. Local television broadcasters are required to ascertain and serve the needs and interests of their local communities. DBS systems are not subject to the same kind of public interest obligations and should not receive special status in individual communities.

(b) The majority of recently-authorized DBS systems are proposing pay programming services. H.R. 5949 clearly excludes "must carry" protection for any pay service, and it would be inappropriate to make an exception for DBS. The FCC has specifically declined to include subscription television (STV) within the ambit of the "must carry" rules.

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[1] Absent "must carry" rules, the FCC's commitment to local broadcasting could be frustrated by cable systems dropping local stations where over-the-air reception has been superseded by the installation of cable. The "must carry" rules were also developed in recognition of the fact that failure of cable systems to carry local television stations would dramatically worsen the competitive position of local television service vis-a-vis cable systems.

(c) Any DBS service providing "free" programming via affiliated over-the-air stations that meet percentage requirements [2] will automatically be carried by cable through the local stations. However, the satellite service itself will not and should not qualify for "must carry" status.

(d) DBS service carried on cable systems would not differ in nature from any of the existing cable "networks" or programming sources which must compete in the marketplace for cable carriage. Mandatory carriage of DBS would thus give DBS programming and operators an overwhelming competitive advantage over other cable program suppliers in the cable programming marketplace. USSB, for example, proposes to use one of its DBS channels to provide a 24-hour news and information service. There are already two cable networks (Turner Broadcasting's CNN and ABC/Westinghouse's SNC) which provide such service and compete for carriage by local cable systems. "Must carry" status for USSB would force carriage of that particular news service at the expense (and possible demise) of the other two services.

(e) Mandatory cable carriage of DBS would give to DBS a tremendous competitive advantage over other emerging delivery systems (e.g., low power TV (LPTV), multipoint distribution service (MDS), and satellite-fed master antenna systems). The FCC, in authorizing DBS, intended no such competitive advantage. Rather, the Commission determined that DBS simply should have an opportunity to compete in a "free" marketplace environment.

(f) STV, MDS and LPTV provide services similar to those provided by DBS and would undoubtedly seek "must carry" status if DBS is so favored. Cable would then become saddled with devoting channel capacity, without pay, to the carriage of numerous new technologies. Again, system owners simply should not use the government to force competitors to help them establish an unfair and unearned foothold in the marketplace. The FCC intended DBS systems to "make it" or not on their own, without assistance from government or from their competitors.

(g) DBS specifically was authorized to provide useful service to rural areas that are too sparsely populated for cable and too distant from over-the-air broadcasters to receive good signals. Under these circumstances, congressionally-mandated "must carry" protection becomes academic.

(2) Cable systems should not be required to carry low power television (LPTV) stations.

H.R. 5949 excludes low power (LPTV) television stations from must-carry provisions. Low power TV is a new service authorized by the FCC which will permit mini-TV stations to originate programming or to pick up programming delivered by satellite. They may carry advertising and charge subscription fees.

(a) The anticipated number of lower power stations makes "must carry" status for them impractical and unduly burdensome to cable operators. As of September, 1982, 118 LPTV stations had been licensed, 207 construction permits had been granted, and 6,306 applications were pending. The FCC eventually expects to authorize between 1,000 and 1,500 stations. The cable copyright compromise was designed to give limited "must carry" relief to cable operators to assure them programming discretion. Giving "must carry" status to low power stations could saturate smaller systems with required signals, contrary to the intent of the bill.

(b) To the extent that low power stations offer a desirable programming alternative, they are likely to be carried by local cable systems voluntarily. This is particularly true in the case of larger cable systems with numerous channels to fill.

(c) The FCC, in its April 26, 1982, Report and Order authorizing low power service, decided that it was not in the public interest to require cable carriage of LPTV stations:

> . . . it is reasonable to assume that, if a cable system has excess channel capacity, it will carry low power programming. Where there is no excess channel capacity, the cable operator should not be required to make the hard choice between the low power signal and other programming for which his subscribers may indicate demand via pay mechanisms, when he already carries the local full service stations. And where low power must compete with other program sources for cable carriage, absence of "must carry" protection could be a spur to low power's provision of creative, innovative programming. This also may encourage low power applicants to seek out remote, unserved areas where cable is thought not to be viable economically, and thereby to fill gaps in existing television coverage, a function for which low

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[2] A cable system with 36 or fewer activated channels may elect not to carry any station which receives neither a 1 percent share of viewing hours in non-cable homes in the county in which the system is located nor a 2 percent of viewing in all homes of that county. Once a signal is deleted pursuant to this exception, the cable system need not carry the signal again until the system expands beyond 36 channels.

power stations are uniquely suited. Low Power TV Report and Order, 47 Fed. Reg. 21,468 (1982).

(d) Granting "must carry" status to LPTV stations, in effect, could transform low power stations into full power stations in cabled communities. If LPTV were given "must carry" status, a low power operator could geographically position his station to achieve required carriage on numerous cable systems. As a result, his total coverage area could be expanded to the near equivalent of a full power station. This is not an effect anticipated by the FCC in establishing LPTV service. Such a result also would contradict and circumvent the FCC's judicially-required obligation to evaluate the potential adverse impact of additional stations on the local services provided by local full power stations.

(e) Low power stations, under FCC rules, are clearly a secondary service not to be afforded the same spectrum status as full-service, full-power stations. For example, an LPTV station will not be authorized if it appears that it will causes objectionable interference to the reception of an existing full-service station. If an authorized LPTV station causes objectionable interference, it must either eliminate the interference or go off the air. On the other hand, low power stations must suffer interference from full power stations.

Denying low power stations "must carry" status is consistent with their intended secondary status. Low power applicants have known that they will have to take a back seat to full power stations and will not be afforded the same kinds of protections.

(f) Low power stations are not required to meet most of the public interest obligations required of by full service television stations which are entitled to mandatory cable carriage. For example, low power stations are not required to ascertain community needs, limit the quantity of commercial matter, air locally originated programming, or operate a minimum number of hours a day. The Fairness Doctrine and political broadcasting rules (equal opportunity, reasonable access) do apply to LPTV stations, but only to the extent of their program origination capability. Stations with limited origination cabability will have to meet less stringent standards than those with their own production facilities and staff. Low power stations also do not operate under the same ownership restrictions as do full service stations. There is no limit on the number of LPTV stations which can be owned by one entity.

(g) "Must carry" rules are grounded in the concept of localism and the need to preserve the right of a local community to receive the full services of the stations licensed to serve them. In the April 26 LPTV Report and Order, the FCC stated that "low power stations are not subject to the programming obligations with regard to the community of license that form the basis for our requiring carriage of full service stations." The FCC has also said that, in granting low power licenses, it will not give a comparative preference to several factors normally given weight in a comparative proceeding—including issues based on Section 307(b) of the 1934 Communications Act (the legislative basis for localism).

(h) H.R. 5949's exclusion of low power stations from "must carry" will have no negative impact upon traditional broadcast translator stations, which rebroadcast the signals of full service local television stations in areas where off-air reception of television service is difficult or impossible. The bill codifies the existing "must carry" status of these stations.

(3) Amendment of the bill to provide for blanket mandatory carriage of all Spanish-language stations is unnecessary and unwarranted.

Under the bill, Spanish-language television stations are treated equally with all other television stations. To be carried as a "must carry" signal on cable systems having 36 or fewer channels, Spanish-language and other stations must meet the "1 percent/2 percent" minimum viewing levels. In this way the cable copyright compromise is crafted to provide limited "must carry" relief to cable operators to assure them flexible discretion in selecting programming for their systems. Allowing modifications or exemptions to the established baseline criteria for any select group of commercial entertainment stations negates the intended thrust of the "must carry" relief in the compromise agreement bill.

(a) Mandatory cable carriage of an entertainment-oriented commercial station on the grounds of format specialization could be construed as providing preferential treatment for a particular category or class of commercial entertainment station. Required carriage of Spanish-language formatted stations could also provide a substantial and unfair competitive advantage over other specialized language or minority-oriented commercial television stations.

(b) A special exemption for U.S. Spanish-language television stations to the cable "must carry" provisions is essentially unnecessary, as these stations predominantly meet the proposed 1 percent/2 percent baseline criteria in areas serving a clear majority of the Hispanic population.

(c) In television markets where commercial Spanish-language stations are currently in operation, a clear majority of the Hispanic population resides incounties where these stations already meet the baseline "must carry" requirement. Specifically, 60 percent of the total Hispanic populatin in these markets is located in courties that: (1) are served by one or more commercial Spanish-language stations, and (2) report viewing levels at or above the proposed 1 percent/2 percent minimums.[3] In the New York and Los Angeles markets, where over one-third of the total U.S. Hispanic population is located, 72 percent of the Hispanic population resides in counties where the local commercial Spanish-language stations currently meet the proposed percentage requirements for carriage on cable system.

(d) Nothing in H.R. 5949 requires a cable system to drop any broadcast station; nor does it prevent carriage of any station regardless of the viewing share requirement. It is reasonable to assume that a cable operator with adequate channel capacity who serves a community with a significant Spanish-language population will not arbitrarily drop a Spanish-language station. Carriage of the Spanish-language station will be even more likely as channel capacity grows.

(e) It souid also be noted that there are a number of other Spanish-language broadcast options in additon to the stations wholly dedicated to such programming. These include programming on commerical broadcast stations and a cable network. The distribution of Spanish-language network programming, in fact, could be facilitated by H.R. 5949. Because the bill relieve cable operators of some of their current "must carry" obligations)—e.g., carriage of duplicate network signals—there will be more channels available for discretionary programming and a larger potential market for Spanish-language program services.

H.R. 5949 does not limit the ability of local franchising authorities to require cable carriage of Spanish-language or other minority stations. In fact, the local franchising process of new cable systems provides an excellent opportunity to insure that a wide variety of minority programming is available to serve locals needs.

CONCLUSION

For all of the foregoing reasons, NAB respectfully urges that the Senate vote promptly to approve H.R. 5949, which would serve the best interests of the public, and the broadcaster, cable and program production industties. The Senate should take this opportunity to enact into law the historic compromise which H.R. 5949 represents.

Chairman **Packwood**. Eddie, thank you.

Mr. Turner, chairman of the board, Turner Broadcasting. Good to have you with us.

Mr. **Turner**. Thank you, Mr. Chairman, and other members of the committees. We appreciate your having these hearings.

My prepared statement has already been distributed, and since events have occurred so quickly, the statement that my general counsel asked me to read this morning I feel is so obsolete, so I am going to try to wing it. And when you push the yellow button I will stop.

As you know, alone amongst all stations when the Federal Communications Commission and the Congress changed the rules to allow a station who wished to do so to try and compete with the three established networks we decided that we wanted to do that, and we felt that there was room in the country for a fourth network and set out to make WTBS a high quality where ratings did not come first but program content did, with decent, all-family programing that everyone could enjoy.

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[3] Additional information is being developed which indicates that an even greater percentage of the Hispanic population in these markets will continue to receive the signal of the local Spanish-language station. For example, some of the counties in which the Spanish-language station does not meet the 1 percent/2 percent viewership criteria have cable systems with more than 36 channels. Because systems of that size must carry all local signals regardless of viewership levels, the Spanish-language station will be granted "must carry" status under the bill.

And we have been tremendously successful. WTBS is now seen in 30 percent of the homes in the United States. In a recent survey that we conducted it is more popular in those homes than the sleazy programs of ABC, CBS, and NBC.

Unlike the National Association of Broadcasters, who I have a lot of respect for, we are not asking for must-carry status. We are only asking that we continue to have may-carry status, not only for WTBS but also Cable News Network, which is dependent upon the profits and support of the superstation.

If this CRT decision is allowed to stand the way it is, it really puts me out of business. While it is very damaging to cable, it is catastrophic to the Turner Broadcasting System. I mean I am not here to plead poverty, because Cable News Network has tremendous value, particularly to CBS who has tried to acquire it in the past, and I am sure that I would have to sell to one of the big conglomerates the Cable News Network and go about my other business. But I would not be able to continue my fight toward providing the American people with better television programing than they have had in the past.

You all know my position on the sports issue. It is well documented in my written testimony and other statements that I have made. I feel that the only reason the sports people were not included in the original compromise prior to the CRT decision was because they had really asked for total control of all games in their territories, and WTBS could not afford the massive blackouts that would be involved.

We would have to either go out of business or drop sports programing, which would deny it not only in the major markets which have already become accustomed to it—and obviously it has not affected attendance at all because baseball attendance this year while cable penetration increased, there were more games shown than ever before, baseball attendance set an all-time record. The ratings for the playoff games, which the Braves participated in for a short period of time, and the World Series were the highest ratings in baseball history, making the value of those events greater. And I submit that the additional television coverage has improved the position of baseball.

Obviously, the individual teams would like to have total control so that they can market their pay packages which are increasing—a dramatic increase as I am sure you are aware—without any competition whatsoever from other games that are televised on the basic part of the cable systems.

And I may even be able to finish before you get to the red button.

We must withdraw our support from this bill unless the CRT compromise that has been proposed by the NAB, the NCTA and ourselves is adopted. I feel like—I really feel like—I talked to Jack Valenti yesterday and also Lou Wasserman. It is really to the MPA's advantage to go ahead and compromise on this issue because it is very advantageous to them to get syndicated exclusivity back, and we have already paid. We have already paid. In the last 2 years we bought $35 million worth of programing with the complete understanding that we would be able to televise it nationally. And what the CRT decision does is it undoes what we have already paid for. So we would appreciate your support. Otherwise, I will not be around much longer to entertain you as I have in the past.

Thank you very much.

[The statement follows:]

STATEMENT OF R. E. TURNER III, CHAIRMAN OF THE BOARD AND PRESIDENT OF TURNER BROADCASTING SYSTEM, INC.

Mr. Chairman, Members of the Committees, my name is Ted Turner. I am President and Chairman of the Board of Turner Broadcasting System, Inc.

I appreciate this opportunity to testify as to the copyright and communications policy implications of H.R. 5949. Cable television, as you know, is one of the fastest growing and most dynamic of all the communications technologies. Turner Broadcasting is privileged to be a key part of this industry.

Our particular segment of the cable business involves the provision of sports, entertainment and news programming to the public. Over 24 million cable homes in all 50 states (90 percent of all homes enjoying cable service) now receive the signal of WTBS Atlanta—the Superstation. The primary, basic entertainment service offered by cable, WTBS broadcasts diversified family information and entertaining programming including movies and the baseball and basketball home games of the Atlanta Braves and Atlanta Hawks. For millions of Americans, it represents the primary alternative to the humdrum, look alike programming of the three commercial television networks.

Within the last two years, we have initiated two, all new, television networks: CNN and CNN Headline News. Now available nationwide to over 16 million cable homes, CNN provides 24 hour, in depth news coverage, feature programs and commentary on the issues and events shaping our world. CNN Headline News, inaugurated just last January, already reaches 2 million homes across the nation with a quick response, news headline service.

With their worldwide newsgathering sources and satellite technology, the Cable News Networks can go anywhere, instantly, to get any story. With a 24 hour broadcast format, they not only can stay with a story to its conclusion, they provide a level of analysis and access to divergent viewpoints and ideas not otherwise available. Together, they provide an information alternative to the cable subscriber far superior to conventional news media.

These networks are fledgling and extremely expensive undertakings, Mr. Chairman. Because communications is such a highly regulated industry, the economic viability of these networks is highly sensitive to government regulation. Accordingly, we are deeply concerned that government not adopt any regulation that would unnecessarily restrict competition in the delivery of cable services to the public or that would undermine the diversity in media voices the public is entitled to receive.

In our opinion, H.R. 5949 impacts television competition and information diversity in several ways. First, the bill reintroduces modified, syndicated exclusivity protection requirements recently rejected by the FCC and the Courts. It requires cable systems, with certain exceptions, to black out syndicated television programming upon the request of local, commercial broadcast stations. This restricts cable's ability to compete with broadcast television and denies the public time diversity in the programming it may receive.

Second, the bill requires cable systems to retransmit the signals of local, independent and network affiliate TV stations. This gives an unfair preference to the three major broadcast networks, whose programming in effect must always be carried, at the expense of the four dozen other television networks whose programming is now available by satellite but is not required to be carried. When you consider the terrible quality of the programming of the broadcast networks—emphasizing sex and violence, and encouraging disrespect for our laws and social values, as compared to the quality of the cultural, news, and minority interest programming now available to cable subscribers on the satellite—this "must carry" requirement is absurd.

On the positive side, however, the bill also fosters competition and diversity in several ways. First, it prohibits FCC regulation of the number of distant broadcast signals a cable system may carry. While this potentially expands the number of program services that may be delivered to the public, a recent decision of the Copyright Royalty Tribunal effectively undermines that beneficial result. In imposing confiscatory royalty rates on cable systems for their carriage of multiple distant broadcast signals, the CRT has precluded such carriage.

Second, Section 101 of the bill clarifies the original intent of the 1976 Copyright Act that satellite and microwave carriers of distant television programming, who have no control over the content of the programming that they provide to cable systems, are exempt from copyright liability. Recent litigation to eliminate this exemption is intended to restrict television competition and information diversity by denying cable systems access to satellite carriers, their current means of program delivery. These efforts, if successful, would extinguish the beacon of knowledge that satellite technology represents for information deprived Americans who live outside major urban markets and therefore lack access to multiple information outlets. Section 101 of the bill is essential to protect the information diversity needs of these non-urban Americans for whom the combination of cable and satellite is the only means to information parity.

That this bill has ambivalent effects on competition and diversity is not surprising. After all, it represents a carefully crafted compromise derived by the cable, broadcast and motion picture industries only with great difficulty. Although we originally opposed any change to the Copyright Act as unwarranted, we are not opposed to the compromise reflected in this legislation. On balance it is a satisfactory bill that, hopefully, will order the relationships and establish copyright stability between the cable, broadcast and motion picture industries.

Moreover, this bill reflects a policy far more consistent with the public interest and current competition and diversity objectives than are several other copyright proposals that have been considered in recent years. These have included: elimination of cable's compulsory copyright license, introduction of retransmission consent, imposition of full syndicated exclusivity for all programming in all markets, and the blackout of all professional sports programming on cable television. In that these proposals may be offered again, it is important to briefly emphasize their deficiencies.

COMPULSORY LICENSE

Elimination of the cable copyright compulsory license is not market deregulation as its advocates proclaim: there is no fully competitive market for the production and distribution of TV programming given the limited number of TV producers and TV stations in the U.S. It would merely enhance the market power of broadcasters and producers by eliminating one form of competition to broadcasting at the expense of the viewing public. Serving only 25 percent of the nation's TV homes from over 4000 systems, the cable industry is still too fragmented and underdeveloped to survive the elimination of the compulsory license.

RETRANSMISSION CONSENT

Retransmission consent is merely a variation of the full copyright liability approach, under which cable could retransmit distant broadcast signals only with the permission of each broadcast station. This approach was tried and rejected by the FCC years ago because it simply didn't work; no consent was ever given. It was also rejected by the Congress just three years ago. Retransmission consent would deny the public the program diversity cable now brings through the retransmission of broadcast signals.

FULL SYNDICATED EXCLUSIVITY

Imposition of full syndicated exclusivity would be similarly inappropriate. First, it would go far beyond the FCC's original rules, which the Courts have agreed were shown to be entirely unnecessary and unwarranted by any record evidence or public interest.

More important from our point of view, this approach would require the immediate deletion of WTBS' programming carried on cable despite the fact that such programming was sold to WTBS in full recognition of the fact that it was to be carried nationally. The facts are that WTBS has been paying program suppliers from 100 to 1,400 percent more for programming based on its national coverage, and, in the past two years, has invested over $38 million in such programming. Suppliers, well aware of our national audience, have bargained aggressively for these price increases. This is further evidence of the fact that the syndicated program market has evolved naturally to account for the development of the "Superstation", and that government intervention is therefore unnecessary.

Were full exclusivity protection to be adopted, the resulting deletion of our programming by cable systems would erode our national audience base on which our advertisers depend. Unable to earn advertising revenues from the remaining audience adequate to cover the premium price paid to programmers for such programming, WTBS, and the still dependent Cable News Networks, could be destroyed, and the competition and program diversity they offer, eliminated.

The programmers, of course, would receive a windfall under this approach. Not only would they receive copyright payments under the compulsory license system for whatever programming wasn't blacked out, they would retain the premium price WTBS had paid and the premium price paid by local broadcasters for this programming as well. This would be clearly inequitable.

A similar result would obtain under the limited exclusivity protection provision currently included in the amendment to Section 111(c) of the Act, were it not for the exception established in Section 405(b). That section properly establishes a transition mechanism grandfathering satellite distributed broadcast programming already under contract from the syndicated exclusivity blackout requirement for the life of those contracts. This provision assures the continued reception of such programming by the public and preserves the status quo with respect to the contract rights of the affected parties.

SPORTS BLACKOUT

The legitimate copyright interests of professional sports is addressed in Title III of this bill. That section codifies the current FCC sports rules and assures that each team may control the TV exhibition of its own games in its own market.

Unsatisfied with this protection, professional sports has asked for an amendment to this bill that would prohibit the retransmission of a television broadcast of any professional sports game over any cable system located within the geographic market of the stadium of any team in the same league, absent the consent of that team. Such an amendment would grant a legislative monopoly to each team in a professional sports league over the television exhibition of all similar professional sports in its geographic market.

WTBS is unalterably opposed to such an amendment. If enacted, it would, for example, prohibit the cablecast of an Atlanta Braves or Atlanta Hawks game now carried on the Superstation in the market of any other professional team in the same league. Twenty-six National Basketball Association and National League cities, serving 36.3 million TV homes or 44.5 percent of all TV homes in the nation, would be directly affected. Hundreds of cable systems that now carry WTBS' broadcast of these games would be required to delete that programming. The magnitude of this audience loss would effectively preclude nationwide exhibition of these games by WTBS in all calbe markets. Cable retransmission of sports event broadcast on WOR-TV and WGN-TV would be comparably affected.

The loss of audience, and the advertising revenues derived therefrom, produced by this restriction would destroy the Superstation and the dependent Cable News Networks. More importantly, the 60 million people who receive the Superstation, and who watched the Atlanta Braves set a new, opening season, record of 13 consecutive wins in 1982 would be denied the program and sports diversity the Superstation now provides. The national impact would be even more severe.

As an inveterate sports fan and as an owner, I know of no fact or reason justifying such government intervention in the sports market. By all available and relevant measures of business performance, there is no demonstrable need for a federal policy to restrict competition in the television exhibition of professional sports.

This is demonstrated, for one example, by the continuing increase in the value of sports franchises in recent years despite the growth of cable and the presence of sports exhibition alternatives like the Superstation. For example, the New York Yankees and San Diego Padres sold for $12 million each in 1973. In 1981, the Chicago White Sox and Cubs sold for $20 and $20.5 million, respectively, while the Philadelphia Phillies sold for over $30 million. This growth in franchise value reflects the continuing vitality in the revenue generating capability of professional sports.

The two principal sources of team revenues are, of course, derived from home gate receipts and from the sale of television and radio exhibition rights. With respect to home game attendance, there is no evidence that cable's exhibition of sports games has significantly or adversely affected gate receipts. Between 1975 and 1980, for example, while the number of cable households increased from 9.8 to 15.5 million, an increase of 57 percent, home attendance at professional baseball games increased by 44 percent from 29.8 to 42.9 million. Attendance at Atlanta Braves games increased by 96 percent in this period despite the local television broadcast of their home games.

Nor has this phenomenon been limited to the major leagues. In the same period, home attendance for the Richmond Braves, one of the farm teams for the Atlanta

Braves, increased by 174 percent from 68,348 to 187,462 despite the fact that the Richmond market is also served by a modern, 36 channel, cable system that imports several broadcast signals carrying major league baseball games.

Sales of television exhibition rights, the other major sports revenue source, is proving a bonanza. Consider, for example, the recent contract between the broadcast networks and the NFL. For exclusive exhibition rights to three different packages of NFL games, the three networks agreed to pay $1.9 billion over 5 years. An increase of 197 percent over the $640 million they paid for a similar 4 year package that ended this year, average TV revenues per team will increase from the $5.6 million earned last year to $12 million this year and an average of $14.2 million per year over the life of the contract. This average television revenue figure of $14.2 million per year exceeds the total gross revenues earned by the Washington Redskins in 1981 ($13.5 million).

The numbers in baseball, while not quite so dramatic, paint a picture almost as rosy. Network payments for nationally televised games in 1982 will total $53.4 million, up 20 percent over 1981. In addition, however, sale of exhibition rights by individual teams to local radio and television affiliates increased by 34 percent in 1982 over the prior year, from $48.4 million to $64.95 million. In addition, the sports interests receive copyright royalty fees under the compulsory license system established under the Copyright Act for cable's retransmission of broadcast games.

Most important, however, absolutely no connection has been established between cable's carriage of sports and the economic performance of the teams. The FCC, which looked at this issue several years ago, rejected the proposition as without foundation. Its conclusion was supported by the blackout studies the FCC did for the Congress between 1976 and 1978, which showed that weather and team performance affected attendance, but that television had no appreciable impact.

As an owner, I know from first hand experience that home game attendance and overall economic performance of a franchise are dependent on a number of complex and interrelated variables. The most important of these is market size. Others include market demographics, ticket prices, the weather, stadium location and condition, the performance of the team on the field, and the competence of management. Cable carriage of sports cannot be blamed for inferior economic performance. Indeed, there is substantial evidence that television, including cable, stimulates public interest in sporting events and increases live gate attendance.

To the extent baseball is experiencing some financial difficulties, they are most likely attributable to free agent bidding wars, that, according to a recent (October 12, 1982) U.S. News and World Report, have increased average salaries from $76,000 in 1977 to $235,000 in 1998. As Peter Bavasi, former President of the Toronto Blue Jays, said in that article, "The lack of self-restraint on the part of a few owners is at the heart of baseball's financial problems."

It is important to remember also that sports franchises in general are owned by the wealthiest individuals and corporations in America: Doubleday owns the Mets, the Chicago Tribune owns the Cubs, Taft Broadcasting the Phillies, Ray Kroc, who invented MacDonald's, owns the Padres, to name a few. While they have invested millions, they make millions. In a time of shrinking budgets, these men need no government handout.

Moreover, the government and the taxpayer already underwrite the sports business by providing tax loopholes that give the owners favorable depreciation benefits, and that permits them to shelter income from their other businesses. In addition, many of the stadiums in which these teams play are municipally owned and subsidized. New York City, for example, reportedly invested $100 million in the rejuvenation of Yankee Stadium. Yet, the Yankees, which reportedly will earn $6.5 million in 1982 from the sale of local TV rights and which may earn up to $100 million for the sale of pay cable rights, pay only a half million a year in rent for that stadium.

The leagues argue, however, that not all teams are economically sound and that the restriction is necessary to protect the weak teams. There are several obvious fallacies with this reasoning. First, they have presented no evidence that cable is the problem and that exclusivity is the solution to their financial problems.

Second, the restriction on cable carriage is not limited to the cities with weak teams: it applies nationwide and protects the wealthy as well.

Third, I believe the leagues are using this argument to disguise their real objective: the transfer of their games from broadcast television to pay television. Current trends show that most teams are creating regional pay TV sports networks. Already 16 of 26 baseball teams, 15 of 23 basketball teams and 9 of 14 U.S. based National Hockey League teams use pay TV for some of their games. If they can guarantee that no competing games will appear on cable through this amendment, sports fans will have but two options: to pay at the park or to pay for pay TV networks.

Finally, even if the weak team argument is valid, government support should be a means of last resort to failing companies, and only then where (a) there is a demonstrable public interest served thereby, and (b) the affected parties have exhausted all private solutions. That is certainly not the case here. First, the protection requested here is so broad, it would deny sports programming to millions of Americans who have no other access to such programming in order to protect the interests of a few. Second, there has been no effort in baseball, at least, for the successful franchises to assist the financially weaker teams. Unlike the NFL, which shares television revenues and gate receipts among teams on an equitable basis, it is every franchise for itself in baseball.

In conclusion, Mr. Chairman, there is no need for a legislative restriction on the cable television exhibition of sports games. This is not a communications issue; it is not a copyright issue. It is a monopoly issue, and no public interest will be advanced in granting such a monopoly to the few millionaires who own sports teams at the expense of millions of ordinary hardworking Americans who are sports fans.

Mr. Chairman, thank you for the opportunity to testify today. I would be pleased to answer any questions you may have.

Chairman PACKWOOD. Thank you, Mr. Turner.

Mr. Rose, Jerry Rose, representing the National Religious Broadcasters.

Mr. ROSE. I want to thank the Committee on Commerce and the Committee on the Judiciary for giving me the opportunity to speak on behalf of H.R. 5949.

The National Religious Broadcasters' concerns over the provisions and earlier versions of the bill have been resolved, and now we do support the bill.

Of primary interest to religious television stations are the provisions of H.R. 5949 that deal with the cable system's obligation to carry the signals of local television stations. For many years the Federal Communications Commission has required each cable television system to carry the signals of the local stations. This right is absolutely crucial to a broadcaster, particularly where large numbers of people have subscribed to the cable.

By and large, cable subscribers have or will have disconnected or will never install the rooftop antennas that are necessary to receive an adequate signal from the local stations. This problem, of course, will be even more acute in the next few years. If a local television station is denied carriage on the local cable systems, viewers will lose access to that station, and the station will lose the financial support necessary to stay on the air.

Now, this drastic change then could well mean the demise of a significant number of stations that are striving to sincerely serve a local need.

H.R. 5949, as passed by the House, strikes a careful balance after compromise between the competing interests of cable operators and local television stations. We feel that it preserves the viability of the local stations while at the same time addresses the concerns of cable operators with small capacity systems and heavy carriage obligations.

Under the bill, television stations which carry mostly entertainment programing will retain the right to be carried on local cable systems so long as they meet certain audience ratings thresholds. However, the carriage rights of educational television stations and nonentertainment commercial stations are not subject then to those audience ratings thresholds.

The must-carry provisions for nonentertainment commercial stations are critically important to religious broadcasters who have directed their programing toward what we consider some of the unmet community needs rather than predominantly entertainment and simply the gathering of rating points.

Specific examples can be found at WCFC-TV, Channel 38 in Chicago, of which I am president. TV 38, as one example, entered into an agreement with Northern Illinois University to present a series called "Classroom 400," which was a graduate level course for teachers who enrolled in Northern Illinois, but they received credit for the television courses that were offered on our television station.

Another example is that we are currently producing and airing a series designed to improve the level of volunteer teachers in churches in cooperation with an organization in Chicago called the Greater Chicago Sunday School Association.

Another example, when the Chicago schools closed briefly, 2 years ago, we began a daily half-hour series giving information to parents as to what could be done at home to lessen the negative educational impact of the school closings. We also allowed for our audience to ask our panel of experts questions via the telephone live. We worked in cooperation with the National College of Education in Evanston, Ill., on that.

While recognizing we may not have had high ratings, we were keenly aware that we were meeting a community need, and thereby sincerely serving the public need.

There are other examples, such as features on foster grandparenting, a weekly program discussing relevant issues concerning our community and our area, with local participants. The list could continue, but for the sake of time, Mr. Chairman, I will move on.

In a series of decisions, spanning several decades, the Federal Communications Commission has repeatedly identified the provision of nonentertainment programing as the keystone of the broadcasters' obligation to serve the public interest. Subjecting the carriage rights of nonentertainment stations to audience ratings thresholds would severely penalize those broadcasters, including most religious broadcasters, whose programing is primarily directed at informing, motivating, or inspiring their audiences.

H.R. 5949 now recognizes that the immense value of the programing provided by religious and other nonentertainment stations, cannot truthfully be measured by ratings points. Passage of this bill will preserve the wholesome, informative, and inspirational programing which religious television stations provide to millions of American citizens.

The detailed must-carry provisions in H.R. 5949 are the product of extensive discussions and painstaking research by the staffs of the two House subcommittees which consider the bill. Hearings of the House Telecommunications Subcommittee focused heavily on the must-carry provisions of H.R. 5949, and the lengthy negotiations on this section of the bill were widely reported in the press.

It is, therefore, disturbing to see that, just days before this Congress adjourns, some groups have come forward, not with genuine legislative proposals, but with overreaching claims which would destroy the work of many months. Some of these proposals would extend must-carry obligations far beyond the present rules of the Federal Communications Commission. Moreover, they would extend the carriage obligation to entirely new technologies in which no investment has been made in reliance on cable carriage. Indeed, the FCC has specifically declined to extend carriage rights beyond conventional television stations.

H.R. 5949 offers an opportunity to resolve longstanding disputes between cable operators, broadcasters, and producers, over issues of copyright payments and signal carriage. This chance, it is our firm conviction, must not be lost; but it easily could be lost if the delicate balance in the bill is upset.

I urge you to adopt H.R. 5949, as passed by the House, without further amendments.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF JERRY ROSE, SECOND VICE PRESIDENT OF NATIONAL RELIGIOUS BROADCASTERS, AND PRESIDENT OF CHRISTIAN COMMUNICATIONS OF CHICAGOLAND

I want to thank the Committee on Commerce and the Committee on the Judiciary for giving me an opportunity to speak on behalf of H.R. 5949. National Religious Broadcasters' concerns over the provisions in earlier versions of the bill have been resolved and we now fully support the bill.

Of primary interest to religious television stations are the provisions of H.R. 5949 that deal with a cable system's obligation to carry the signals of local television stations. For many years, the Federal Communications Commission has required each cable television system to carry the signals of local television stations. This right is crucial to a broadcaster, particularly where large numbers of people have subscribed to cable. By and large, cable subscribers have disconnected or never installed the rooftop antennas often necessary to receive local stations off the air. If a local television station is denied carriage on local cable systems, listeners will lose access to the station and the station will lose the financial support necessary to stay on the air.

H.R. 5949, as passed by the House, strikes a careful balance between the competing interests of cable operators and local television stations. It preserves the viability of local television stations while addressing the concerns of cable operators with small capacity systems and heavy carriage obligations. Under the bill, television stations which carry mostly entertainment programing will retain the right to be carried on local cable systems so long as they meet certain audience ratings thresholds. The carriage rights of educational television stations and nonentertainment commercial stations, however, are not subject to audience ratings thresholds.

The "must carry" provisions for nonentertainment commercial stations are critically important to religious broadcasters, which have directed their programing toward unmet community needs rather than entertainment and ratings points. In a series of decisions spanning several decades, the Federal Communications Commission repeatedly has identified the provision of nonentertainment programing as the keystone of a broadcaster's obligation to serve the public interest. Subjecting the carriage rights of nonentertainment stations to audience ratings thresholds would severely penalize those broadcasters—including most religious broadcasters—whose programing is directed at informing or inspiring their audiences rather than providing entertainment. H.R. 5949 now recognizes that the immense value of the programing provided by religious and other nonentertainment stations cannot truthfully be measured by ratings points. Passage of this bill will preserve the wholesome, informative and inspirational programing which religious television stations provide to millions of American citizens.

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H.R. 5949 offers an opportunity to resolve long standing disputes between cable operators, broadcasters and producers over issues of copyright payments and signal carriage. This chance must not be lost—but it easily could be lost if the delicate balance in the bill is upset. I urge that you adopt H.R. 5949 as passed by the House, without further amendment.

Chairman PACKWOOD. Thank you, Mr. Rosé. Mr. Henry Cauthen, general manager of the South Carolina ETV Commission.

Mr. CAUTHEN. Mr. Chairman, I appreciate the opportunity to testify on behalf of the public noncommercial educational television stations of the country, on behalf of legislation that is very important to all of our stations, whether they be stations that serve the major metropolitan areas like New York and Los Angeles, or out in the sticks like South Carolina. It is important to all of us.

H.R. 5949 was approved by the House on September 28, and it is now, as you know, very well in your hands. As vice chairman of the Public Broadcasting System Board, I come before you on behalf of our system to strongly support passage of this legislation this year. But I also have strong personal convictions about this legislation, both as an individual and as president of my State's educational television network.

H.R. 5949 is a vital piece of legislation. It helps undergird and support the very foundation on which this country's broadcasting system, both commercial and educational, has been built. That is, local service and local control.

This legislation helps insure that the major financial investments made by businessmen in commercial broadcasting and taxpayers and contributing citizens in educational and public broadcasting are protected without saddling cable television systems with unreasonable restrictions or requirements. It also, however, recognizes changing communication environments.

Today, numerous Federal entities have jurisdiction over various aspects of the rules under which broadcasters and cable systems must operate. Enactment of H.R. 5949 can eliminate much of this uncertainty and restore a balance to the broadcasting and cable regulations. Only you, the Congress, have the power to put in place the framework that is fair to all affected entities.

We believe this is a fair framework. We believe this is a way to restore balance and order to the system.

[The statement follows:]

STATEMENT OF HENRY CAUTHEN, PRESIDENT AND GENERAL MANAGER, SOUTH CAROLINA EDUCATIONAL TELEVISION COMMISSION

Mr. Chairman and Members of the Commerce and Judiciary Committees, I appreciate this opportunity to present testimony on behalf of this nation's public noncommercial educational television stations with regard to H.R. 5949, the Cable Copyright and Signal Carrying Act of 1982, passed by the House of Representatives on September 28. We strongly support enactment of this legislation this year.

As many of you know, public television will lose up to $60 million in federal support as a result of budget cuts for the Corporation for Public Broadcasting, the National Endowments for the Arts and Humanities, the Department of Education, the National Science Foundation and the Commerce Department's matching grant program for construction and equipment. Of particular interest to me in my role as Vice Chairman of the PBS Board has been the report of the Temporary Commission on Alternative Financing for Public Telecommunications, submitted to Congress in June 1982. According to that Report, there are no obvious alternative sources of substantial revenue which can make up for reduced federal support. A codified guarantee of cable carriage of our services is one of the most important sources of additional revenue because it is critical to our ability to increase viewer support. Thus we urge Senate approval of H.R. 5949 before Congress adjourns this month. We further urge you to reject any amendment which would alter the delicate balance of interests incorporated into H.R. 5949 as such an amendment would preclude enactment of this critical legislation.

The cable and broadcast industries have a symbiotic relationship. Cable initially developed in order to provide broadcast television programming to Americans unserved by local stations—due to physical distance from television transmitters or atmospheric and terrestrial interference with the transmitter's signal. Broadcasters have benefitted from the increased reach of their services that cable systems provide. Continued cable carriage of these basic services is as essential to today's energetic enterprise as it was to yesterday's infant industry.

The broadcasting and cable television industries will co-exist at least through the end of the century and will provide the public with an expanding variety of services and program formats. Public television will continue to play an important part not only with its traditional services but also with expansion into emerging technologies which can extend our educational and informational services.

Public television stations are particularly dependent on cable carriage. Nearly two-thirds of our stations operate on the UHF band, which is far more vulnerable to interference from the earth's contours and atmospheric disturbances than the predominantly commercial VHF band. In South Carolina for example, only one of our ten broadcast TV stations, WITV in Charleston, operates on a VHF frequency. Our transmitters were often built on land that was available rather than desirable, both in terms of how far and where the signal would reach. Cable retransmission of public television signals counteracts our UHF handicap and signal degradation problem. Increasingly cable systems are providing remote control devices. The channel switching to see "what's on cable" provided by these devices serves to expose our programming to and capture audiences who never make it to the upper reaches of UHF where many public television stations reside. Because it can increase the number of people who are able to view our stations by improving the quality of our signals and extending the reach of our services, it helps us attract a larger base of voluntary subscribers, upon which we are more financially dependent now than ever before.

As a result of the federal government's fifteen year investment, the number of public television stations has more than doubled; although over 90 percent of our population can receive a signal, the quality of service varies according to the height, power and location of the local transmitter. A continued federal investment remains crucial to our survival, but we are also committed to increasing our self-sufficiency. One of the most promising sources of additional revenue is voluntary viewer contributions, which have risen from just over $3 million in 1966 to $73 million in 1980. Increased cable carriage is critical to meeting this challenge.

Codification of H.R. 5949's modified version of the FCC "must carry" rules is necessary to establish a stable environment which guarantees cable carriage of essential local broadcast services.

Under the Communications Act, the Fedral Communications Commission only grants commercial and noncommercial educational television licenses to entities promising to serve local needs and interests. The explosion of the information industry has increased rather than diminished the need for this local service. Commercial broadcast services condense key events into manageable proportions. Public television stations, free from the constant commercial constraint to amass large audiences, can air the complete contents of press conferences by governmental leaders, gavel-to-gavel coverage of state legislatures, city councils, school board and public utility commission meetings as well as public interest programming for diverse, but often distinct audiences—children and elderly; black, hispanic and other ethnic or cultural minorities; the handicapped and hearing-impaired; those who appreciate opera, theater, science programming and expanded discussions of public affairs. Recognizing the importance of preserving these local services, the Federal Communications Commission adopted rules requiring cable systems to carry locally available broadcast signals. The FCC has not required newer telecommunications services such as low-power and direct broadcast satellites to provide local services and thus has not required cable carriage of these services either.

Enactment of H.R. 5949 can overcome uncertainty about regulatory adjustment of the must carry rules by codification of them. As we have seen over the last few years, changes in any FCC regulatory area can upset the delicate balance of broadcast-cable regulation over which numerous Federal entities have jurisdiction. For example, the Copyright Act of 1976 was premised on an assumption of continuity in FCC regulatory policy toward cable; with the alteration of that policy—elimination of the distant signal syndicated exclusivity rules by the FCC—the underpinnings of the new copyright law were undone and revision requested by those adversely affected. Only the Congress, with its ability to respond to court decisions and revise agency regulations ranging from the Copyright Royalty Tribunal to the Federal Communications Commission, can construct a framework of fairness for all affected entities, allowing broadcast and cable services to develop with a minimum of friction. Enactment of H.R. 5949, which was developed from a negotiated agreement among these parties, thus presents the opportunity to resolve overlapping public policy issues and end unnecessary disputes between the broadcast and cable industries.

Even the current FCC regulations guaranteeing cable carriage have proven to be an illusion—not a reality—for some of our public television stations. A cable system owner who does not wish to carry a local broadcast station which must be carried under these rules need simple apply to the FCC for a waiver. Resolution of such waiver requests at the FCC frequently requires up to two years—an imposition of time and energy and expensive legal fees that public television stations can ill afford, particularly as federal support declines. We in South Carolina have been blessed by good relations with the cable system operators in our state. However, in Austin, Minnesota, for example, the local public television station programming is only carried by one area cable system when a simultaneously duplicating signal of a commercial network affiliate is blacked out in favor of identical programming by a "more local" affiliate of the same network. Some of this public television station's best programming is blacked out the rest of the time—Sesame Street, Mr. Roger's Neighborhood, Electric Company, Studio See (for children), Over Easy (senior citizens), and MacNeil Lehrer from 3–7 p.m. on weekdays as well as Righteous Apples, Numero Uno, The Lawmakers, Wall Street Week, Washington Week in Review, Tony Brown's Journal and Great Performances on weekends. Another area cable system has placed this station on a cable channel which was kept vacant for the last ten years because of co-channel technical difficulties. The result is a juxtaposition of two pictures on one channel and the necessity for a second round of extended negotiations among the parties at the FCC to secure more appropriate relief. In Kentucky, the State House recently approved legislation requiring carriage of local public television stations—ostensibly already ensured by the FCC rules—because the cable system in the district of the bill's sponsor did not comply with the rules.

In South Carolina for a number of years we ran two separate broadcast schedules, many of the same programs at different times for the convenience of our citizens. During this period, we were allotted two channels on many of our state's cable systems. The current funding situation forced us to move to a single schedule. Almost immediately and justifiably so we were dropped from the second channel and replaced with other services. Should we be able to restore the original service, our chances of regaining the second channel are slim absent enactment of H.R. 5949. My point is that the pressure for channel space is real and that codification for the must carry rules is essential to the continued wide availability of our service.

H.R. 5949 eliminates some unnecessary public television cable carriage rights and guarantees cable carriage of the diversity of programming provided by most of the public television stations in larger metropolitan areas. This balance—accepted by all the affected parties—should be preserved.

In nearly half of the states (23) in which public television programming is locally originated (48), a single licensee provides nearly identical programming for a series of transmitters and translators in the state. Under the provisions of H.R. 5949, a cable system would no longer be required to carry a public television station or translator which simultaneously duplicates most of the programming of another, more local public television station or translator. In response to our request, the Committee Report language states that a cable system is not required to carry a public televison station which waives its carriage rights under this legislation.

In larger metropolitan areas, where a number of public television stations provide a diversity of services, H.R. 5949 guarantees that at least three such public television stations will be carried on a given cable system.

Unlike commercial network affiliates, which usually simultaneously duplicate up to two-thirds of their programming during a normal broadcast day, public television stations seeking to serve the same market area tend to counter-program the schedule of the predominant public television station in the market. Thus a sample week of programming schedules in three markets served by at least four public stations—New York City, Los Angeles and San Francisco—revealed virtually no simultaneous duplication of programming. The guarantee of cable carriage of at least three public television stations ensures an important diversity of service to the audiences public television was created to reach.

At a time when public television stations offer nearly all of the television programming specifically designed to improve the educational skills and expand the cultural horizons of our children, it serves the public interest to provide children with program choices ranging from Sesame Street and the Electric Company, and to Villa Allegre, Up and Coming and Studio See during the hours after school.

Multiple channels in a single market serve target audiences with special schedules during prime time as well. KLCS in Los Angleles, for example, provides programming for minorities and children—Presente, From Jumpstreet and El Espejo (minority), Why in the World (children) and Pochtlan (English as a second language). The Captioned ABC News is shown at an early hour for the hearing-impaired. In New York City, WNYC airs one hour of local news and commentary—"News from City Hall-City Comment"—and a two-hour Black Cultural service. Services such as these are particularly valuable and attribute to the diversity of public television. College credit courses are available during prime time on stations in each of these markets.

Because cable carriage substantially enhances the quality of our signal, it improves the reception of instructional programming provided by over 90 percent of our licensees. Fourteen million children and young people in one-third of our nation's elementary and secondary classrooms and 66 percent of South Carolina's public school students in well over half of our schools use instructional television. Over 500 colleges and universities in 41 states including five in South Carolina utilized the college credit programs provided by the Public Broadcasting Service's Adult Learning Service during its first year of operation. Two non-duplicative K-12 services and two non-duplicative post-secondry services are provided in San Francisco and Los Angeles. According to the office of the Los Angeles County Superintendent of Schools, five or six instructional channels could be effectively utilized. In South Carolina, using our broadcast stations and our unique closed circuit distribution system we are currently sending out five channels of non-duplicative instructional programming. In New York City, three of the four stations receive state funding to provide a coordinated elementary and secondary format to the schools; two non-duplicative post-secondary schedules are available as well.

The opposite situation occurs in predominantly rural areas. In many western states, public television service from an originating station is available only to those living in or near the larger cities. Those living in 70-90 percent of the remaining geographical area of these states depend on translators, which retransmit the signals of the originating stations. Even rural parts of Ohio and New York depend on translator service. In these areas, cable carriage of translator signals is as important as carriage of originating stations elsewhere.

Recent surveys of actual and potential cable subscribers show a strong interest in the type of programming we offer. CableMark, a study by the national cable television research company ELRA Group, found six types of programs that form a pattern of consumer interest—family, public affairs, entertainment, news and information, self-improvement, and culture. Children's programming was of interest to 45 percent, college credit to 65 percent and legislative programming to 57 percent. The same survey found that a disproportionate number of cable programs are targeted toward only one audience—the baby boom generation—leaving a gap in services geared toward audiences such as senior citizens, the less-educated and the less-affluent. A 1980 study for the Broadbank Telecommunications Regulatory Board of Madison, Wisconsin showed strong consumer interest in receiving a second public television station, self improvement programs (How-To-Do-Its), BBC-type programming, professional development/continuing education and college courses. Much of this programming is inconsistent with the for-profit dictates of commercial programming services—cable or broadcast—but provided free of charge by public television stations. Thus the diversity of our programming appeals to cable audiences without extra pain to their pocketbooks.

Having concluded our formal statement, I welcome the opportunity to respond to any questions and look forward to working with you and the Subcommittee toward enactment of H.R. 5949.

Chairman **PACKWOOD**. Thank you very much, Mr. Cauthen. We will conclude this panel with Stephen Effros, executive director of the Community Antenna Television Association.

Mr. **EFFROS**. Thank you, Mr. Chairman. Mr. Chairman and members of the committees, the Community Antenna Television Association, better known as CATA, was one of the industry groups that ultimately supported the passage of H.R. 5949 in the House of Representatives. I must reluctantly tell you today that the Community Antenna Television Association can no longer support the compromise legislation. We are withdrawing our backing of the bill at this time and we urge you to vote against its passage.

This bill was initially adopted in the House after a lot of negotiation, as you have heard. It was basically a three-cornered stool. It had three primary provisions to it. For the broadcasters, they got must-carry into law, and the Community Antenna Television Association and many cable operators disagree totally with must-carry. With all due respect to your question before, Mr. Chairman, the must-carry rules entail the Government trying to tell the people what they have to watch. And we don't think the Government should have that power, let alone exercise such power.

In the case of religious broadcasts, for instance, you are telling us we must carry the religious broadcaster who owns a license in a community; whereas, that might displace another religious carrier who is sending transmissions via satellite. We do not think that is the Government's job. We disagreed with that, but it was part of a compromise.

We disagreed with syndicated exclusivity. That is what the Motion Picture Association wanted most. That was their corner of the stool, and they got syndicated exclusivity which, as you will hear from other panels today, basically says that a lot of programing that cable subscribers would like to see, they will not be allowed to see because some broadcaster in the market has a contract for that programing. He may never show it in the market but he has a contract for it, and therefore, those people will not be allowed to see it regardless. We disagreed with that, too, but that was part of the compromise.

The final leg of the stool was the leg for the cable television industry, and that leg simply said that the FCC had recently eliminated its distant signal restrictions. Those restrictions had originally been imposed to protect broadcasters, and the FCC got rid of those rules because it said we do not need to protect the broadcasters for distant signals.

The parties came to Congress and asked for basically a reimposition of those rules through copyright law. This agreement, H.R. 5949, was an agreement that said no, we will allow the cable operators to continue the right to carry distant signals, the additional distant signals that they were allowed to carry as a communications policy question after the FCC eliminated its rules. So that was our leg of the stool.

The Copyright Royalty Tribunal 3 weeks ago came along and said we don't really care what the policy is, we don't care why Congress adopted the copyright law the way it is. We have taken our mandate to write the rules the way we want to see them written, and they have written them economically as opposed to legislatively.

The economic result of the CRT decision is to eliminate cable's leg of the stool of H.R. 5949. The must-carry rule leg stays in place. We do not like that. The syndicated exclusivity rule stays in place; we do not like that, but our ability to carry distant signals is eliminated by an economic decision that makes the cost of those signals so high that they are prohibitive for cable operators to carry them.

The Community Antenna Television Association likes to honor its commitments. We do honor our commitments, and throughout this process when we did finally get on board with this bill, things happened that resulted in us not liking the bill this day, or liking it the next day. We did not withdraw our support.

However, the CRT decision has put us in the position where the subscribers in this country are going to be denied programing. Plain and simple. Particularly in the smaller markets they will be told that they can only see one distant independent signal, and that is not for any economic reason, not for any policy reason other than that the Copyright Royal Tribunal has created a situation which will result in the denial of programing in smaller markets. The large markets will be able to see more programing than they already have; the smaller markets will be able to see less programing than they already have. It is crazy.

While we honor our commitments, we have to also represent our subscribers and our members, and I am very reluctant, as I said at the beginning of this testimony, because we did make commitments to Mr. Kastenmeier and to the Members of the House to support this bill after some arduous negotiations. However, we feel that the bill at this point does not serve the American viewing public, it does not serve the cable television industry, and unless a solution can be found to the Copyright Royalty Tribunal problem such as the solution that Mr. Fritts and Mr. Wheeler have talked about today, we can no longer support the bill and we are withdrawing from the compromise and ask that the bill be defeated.

[The statement follows:]

STATEMENT OF STEPHEN R. EFFROS, EXECUTIVE DIRECTOR, COMMUNITY ANTENNA TELEVISION ASSOCIATION

Mr. Chairman, members of the Committees, I am Stephen R. Effros, Executive Director of the Community Antenna Television Association. CATA was one of the industry groups that ultimately supported the passage of H.R. 5949 in the House of Representatives. I must releuctantly tell you today that the Community Antenna Television Association can no longer support this compromise legislation. We are withdrawing our backing of the bill at this time and we urge you to vote against its passage.

As some of you already know, CATA had originally planned not to testify at these hearings. We found ourselves in an awkward position of either violating an agreement previously reached or stating things before this Committee hearing that we no longer felt were true. The simplest course seemed to be to not say anything at all. However events have overtaken that decision. We cannot sit silently on the sideline while the American viewing public and cable operators throughout the country are being seriously injured and make believe that the legislation you are considering today is in the public interest. It is not.

Let me back up a moment and give you a little history so you will understand why we have had to take the action we are taking today. CATA represents cable operators throughout the United States—both small and large operators. We focus our attention primarily on the non-major urban markets. That is, we leave to the NCTA the formidable task of dealing with the problems of cable television in the large metropolitan areas. We focus on the more traditional systems that have been built and continue to be sought by those who do not already have a multiplicity of television programming available to them.

Those subscribers and cable systems have been dealt a very heavy and unfair blow by a recent decision of the Copyright Royalty Tribunal. They have suddenly, once again been declared "second class citizens" with regard to the television programming they will be allowed to see. We cannot stand by and let that happen without a fight. Until the decision of the CRT was announced the legislation embodied in H.R. 5949, while it did not provide all of the relief from onerous regulations that CATA would have hoped, was at least a step in the right direction for some operators. Of course, for others, as you will hear today, it was a bad agreement. That is the nature of compromise.

CATA was not a party to the compromise sessions. We opposed the entire process from its inception. We believe that the cable television industry did not need to make any further concessions to Hollywood. There is simply no proof that the cable industry is injuring the copyright owners in any way that would warrant the additional relief sought.

However, as you know, as the process of negotiation continued, communications issues became intertwined with copyright issues. In the communications arena we felt that there was considerable merit to some of the provisions included in the ultimate package. In particular, any legislative lessening of the so-called "must carry" rules was favored by CATA members. We believe the "must carry" rules are a blatant violation of our First Amendment rights. Thy are also a taking of our property without compensation. They are illegal, and CATA will support any Court action seeking their elimination. Absent that, we were willing to support some lessening of those rules in the current bill. Further, at the time the compromise was made we were offered a legislative solution to another problem that had developed at that time; a misreading by a Court regarding the appropriate application of the copyright law to passive carriers. It was that provision that finally induced CATA to drop its opposition to the overall bill and support the compromise.

The members of the Community Antenna Television Association value their commitments. Thus, when a Higher Court reversed the improper ruling and virtually eliminated the need for that legislative language, CATA was asked whether it would therefore withdraw its support for the fragile compromise reached by all of the parties. We did not. We had made an agreement, and although that agreement was no longer significantly beneficial, we did not intend to go back on our word. We decided that we would no longer actively support the measure, but we would not seek to upset it either.

CATA intended to maintain that position until just a few days ago. We, like all others involved in the cable television industry, have been spending the past few weeks analyzing the potential impact of the recent decision of the Copyright Royalty Tribunal to, in effect, reimpose the distant signal limitations originally applied by the FCC. That, after all, is what the CRT had done. One does not have to delve too far into the figures to find this out. All you have to do is listen to the statements of the Chairman of the Tribunal, who openly acknowledges that he does not expect cable operators to actually pay the prices the CRT has mandated for distant signals. Instead, he expects cable operators to drop the signals! That is an economic reimposition of the old FCC rules.

CATA believes that the CRT has violated its mandate, and the purpose of the Copyright law in what it has done. Copyrights are supposed to not only protect the creator of works, but assure that those works are in fact disseminated to the American public. The CRT has gone about accomplishing the reverse. They have intentionally created a situation that they acknowledge will result in the elimination of programming now seen by the American public.

What is worse, the CRT has chosen to take the course of reimposing rules that originally had nothing to do with copyright, but were protectionist in nature. Those rules were designed to protect broadcast stations in smaller television markets. They intentionally limited the number of television signals America could see in those markets in order to prevent competition. CATA has long objected to those rulings, and finally, in 1981 they were eliminated upon an irrefutable showing by the FCC itself that the protection was not in any way justified.

The CRT, by economic manipulation, has reimposed those rules. The result will be that American viewers not already receiving numerous television signals will be limited to viewing just one additional "distant" signal, while those who already can see more than one such signal in their own community will be allowed to see more! This is absurd. It is the opposite of the supposed purpose of the Copyright law. It is enforcing scarcity where it already exists and preventing further diversity in those areas that already have it. In short, the rights of the American public are being skewed in favor of the Hollywood marketeers.

Even if H.R. 5949 were the best piece of legislation we had ever seen regarding Copyright—and it is far from that—we cannot now support it unless the American viewing public's rights are reaffirmed in the legislation. The Copyright Royalty Tribunal's decision must be overturned. It can be, by an inclusion in H.R. 5949 voiding the recent decisicns of the Tribunal. Were language of that nature added to the bill we would support it. However, without that addition we believe any cable/copyright legislation now adopted would simply perpetrate a continuing fraud on the American public by claiming that the Copyright Law assures the dissemination of literary works to them while in fact the law is being used to deny access to those very works.

I said in the beginning of this testimony that CATA reluctantly must withdraw its support for H.R. 5949. That is true. We would prefer to honor our commitments to Mr. Kastenmeier and the members of the House of Representatives to support the bill. Events, however, have forced us to weigh those commitments against our overriding obligation to properly represent our membership, and the viewing public they serve. We must come down on the side of honesty and candor. CATA can no longer support H.R. 5949 in its present form. We will actively work, and seek to form a coalition of others in the industry to prevent the passage of H.R. 5949 or any other cable/copyright legislation until the Congress addresses the vital issues we have raised here today.

Thank you for this opportunity to appear before you today. I would be more than happy to answer any questions you may have.

Chairman PACKWOOD. Thank you, Mr. Effros. In this committee, we have followed the rule I leaned long ago at the feet of Russell Long: First come first served on questions, and holding ourselves to 5 minutes on the first round. And we will go around and around as long as any members wants to ask questions.

And as I arrived first, Mr. Wheeler, do you think the CRT decision was illegal to the extent that you have a right to go to court and sue and win, or are you simply saying it was ill-advised?

Mr. WHEELER. We are in court right now, Mr. Chairman.

Chairman PACKWOOD. And without a CRT amendment, which is the Judiciary's jurisdiction, not Commerce, you are opposed to this bill?

Mr. WHEELER. I would suggest that it is also the Commerce Committee's jurisdiction as well because of the fact that the CRT is reversing communications policy established under the guidance of this committee by the FCC, an agency for which this committee has oversight responsibility.

Chairman PACKWOOD. But in any event, without the change, you are opposed to the bill?

Mr. WHEELER. What I have said—I have tried to suggest that we made an agreement and we stick to the agreement. However, there have been extreme changed circumstances that we believe, we hope, that you will address on behalf of consumers who are going to start looking at black channels in 28 days.

Chairman PACKWOOD. Let me ask you this, both of you, Mr. Wheeler and Mr. Effros. It was at the request really of cable that the CRT was created. You were the ones that wanted it so that you would not have to negotiate individual agreements with hundreds of syndicators. And now an agreement is made among a great many parties involved in this bill and suddenly, the thing that is causing you to have misgivings and Mr. Effros to change his position, is that your creature has reached a decision you don't like. Do I phrase it right?

Mr. WHEELER. I am not sure it is our creature. Let's go back and look at the history a little bit. You recall there were two Supreme Court decisions that said we had no copyright liability. And then in 1976, Congress amended the act. Part of the fact that we were giving up those Supreme Court decisions was getting a compulsory license.

The copyright owners said OK, we want you now to pay us for that license. We said OK, we will set the schedule in the bill. They said, well, what do we do about inflation? What do we do about it if the FCC changes the rules? So, it was that kind of a situation which created the CRT. I would not want that albatross hung around our neck; I think it belongs to the other parties.

Chairman PACKWOOD. You would be happy to go back to the post-Supreme Court decision with no copyright and carry all the signals you want?

Mr. WHEELER. We would be very happy to talk about that.

Chairman PACKWOOD. If we come out with that conclusion, it may destroy the coalition on this bill.

Mr. EFFROS. Mr. Chairman, a simple response to that. We are in a situation now, an absolutely crazy situation, where because of rulings there are cable operators in the room today who are required to carry a host of signals and then required to pay for the carriage of those signals, even though they do not want to carry the signals in the first place.

The Copyright Royalty Tribunal was a creature that we all assumed, and possibly, as it turns out, wrongly, would follow the mandate of the law, and the law was to allow cable operators to carry signals. We already have evidence on the record—I mean, it has been in the Washington Post, it has been in the Wall Street Journal—of quotations of the Chairman of the CRT saying well yes, we set these rates high but we do not really expect the cable operators to pay those rates; we expect them to drop the signals.

Therefore, from our perspective, we believe that the Copyright Royalty Tribunal has not followed its mandate. It has set a rate that intentionally prohibits us from carrying signals, rather than allowing us to carry those signals.

Mr. WHEELER. Could I follow up on your original question? I do need to clarify the record on one point. We asked for this proceeding at the CRT that ended up hanging us, OK? And we asked for it because we thought OK, it is there in the law, it is a mechanism, it ought to work.

What the CRT did was to ignore the standards in the law that we expected and that they had previously, in other proceedings, followed; standards such as consider the impact on consumers. As Steve just said when the chairman comes out and says, "We expect them to drop signals," that is not considering the impact on consumers.

The other standard is consider what the charts showed: That stair-step of a declining marginal value of additional signals. They ignored that. And they went their own merry way.

Chairman PACKWOOD. There is a fair number of lawyers on this dais up here, and we have all, in trial, asked questions we wished we had not asked because the answer did not come back the way we thought it would come back. Let me ask Mr. Rose, and then the same question to Mr. Cauthen.

Why only the religious broadcasters and public television who do not meet the 1-percent, 2-percent threshold? Why carry you? Are there other groups of equal stature, equal right that ought to be carried?

Mr. Rose. Well actually, what we have talked about is a percentage of programing which, in fact, includes religious broadcasters. Nonentertainment programing really was what we came in with. It so happens that it was the religious broadcasters that came forward and said hey, there is a problem.

But really, what we have been talking about more than religious broadcasters is a type of programing. As long as I have been in broadcasting, which is close to 20 years, I have constantly heard that it is extremely important that television stations serve the public need with public affairs. There has been a tremendous emphasis on the area of public affairs.

And really, what we are saying I think more than anything else is that the local station that is there, trying its best to serve the public need and especially when you are not in competition for the ratings but you are there trying to serve some of the unmet needs of the community, and then to be penalized for that because you are not there competing for the higher ratings, we do not feel that that is justified.

So, we are not really coming in saying as religious broadcasters that we deserve favors. But the problem has already been recognized. It was recognized with the public broadcasters that there are unmet needs in the community that need to be served. But what happened is that the commercial or the nonentertainment commercial broadcasters simply dropped through the cracks, and it so happened that it was the national religious broadcasters who stepped forward and said hey, there is also a problem there.

So really, that is the question I think that we are addressing.

Chairman Packwood. Mr. Cauthen?

Mr. Cauthen. Yes, Mr. Chairman. The very nature of the question you raised I think is the justification for what we are talking about. Because some of the reasons for the low carriage or low viewership is the fact that we are providing material that is not available anywhere else. It is material that is essential educational broadcasting, programing for the schools, things that we know are not going to have high audience ratings in general terms, but have very significant impact on the welfare of the country.

The country itself, the Federal Government, encouraged the development of educational and public broadcasting through support grants through the years. We now have 297 stations. This bill is tremendously important to us because now Federal support is being cut by something like $60 million.

We have got to have much more support from the general public to make up for that, and it is folly to think that the public is going to tune in to UHF television that is not carried on cable when they are hooked into a cable system. So it would be the death knell for those stations that are caught in that trap.

And that is the reason that it is so tremendously important to us.

Chairman Packwood. Thank you. We will come back to that. Senator Specter?

Senator Specter. Thank you, Mr. Chairman. Mr. Turner, earlier commentaries have touched on the question about the marketplace being able to handle a number of the problems, but the blackout issue cannot be handled by the marketplace or by contract, absent some extraordinary type of contractual arrangement.

When you have testified about having the Braves, for example, telecast into a city like Pittsburgh, which, incidentally, happens to be in my home State, what considerations are there in your mind on the problem of dwindling home attendance that a city like Pittsburgh, and its team the Pirates, now face?

Now, we want to maintain access for the consumer, but at the same time we want to keep the baseball leagues in operation. That requires having a number of teams in a number of cities. Why shouldn't there be some protection for the Pirates not to have the Atlanta Braves telecast in Pittsburgh by cable on the same day that they are playing at home?

Mr. **Turner**. Senator, the Atlanta Braves are not really in the majority. A very small minority in the Pittsburgh area are on the cable systems. But for the last 15 years, the New York Mets and New York Yankees have been imported in a very extensive cable operation around Pittsburgh.

Pittsburgh attendance and the cable penetration in Pittsburgh has been high for a number of years because of the terrain as well as the other programing. The Pittsburgh problems are caused by other factors other than the television, cable television. Just like in Philadelphia there is a great deal of cable, but there has been no problem as far as the attendance at the Philadelphia Phillies games.

I have been a strong proponent of revenue sharing in baseball, similar to the revenue sharing that they have in the NFL. But the wealthier teams in baseball like the Dodgers and the Yankees have been adamantly opposed to it and continue to do so.

Unless in the MPA and in baseball we do adopt revenue sharing, particularly as the pay television revenues start to kick in in the larger cities like Philadelphia, New York, and Los Angeles, the economic differentiation between the weaker, smaller city teams like Pittsburgh, Atlanta, Cincinnati, Kansas City, and the large market teams, the disparity will continue to grow until the smaller town teams will dry up and blow away.

Revenue sharing is the answer; not regulation of cable television games.

Senator **Specter**. Mr. Turner, I do not think you are correct about the Philadelphia situation. There is not a great deal of cable in the Philadelphia area, and it may well be that the absence of the cable contributes to the attendance of the Phillies. But whether or not it is Atlanta cable or New York Met cable, doesn't that really pose a problem to a city like Pittsburgh until you have revenue sharing? Isn't the cable blackout provision the sort of remedy which ought to be in place until there is revenue sharing? There may never be revenue sharing with baseball.

Mr. **Turner**. Well, there will be if there's only four teams left. I think it will occur before——

Senator **Specter**. Baseball may not be left if there are only four teams.

Mr. **Turner**. That is exactly right, and unfortunately, there are other problems in the country that are greater than that. But to take away from the cable subscribers and the viewers of America, the millions of homes that have been enjoying these ballgames for years and with baseball attendance rising every year, I mean obviously, some teams are going to be doing poorly while some teams are going to be doing well. And the Pittsburgh Pirates definitely have a problem.

We could discuss their problems in great length, but it is not, in my opinion, involved with the importation of the cable television games.

Senator SPECTER. Well, Mr. Turner, as I understand the law, on the issue of televising, say, via a national television network, taking the same example, a Pittsburgh afternoon game, the league has the ultimate control to prohibit, say, CBS from televising the Dodgers and the Phillies into Pittsburgh. Why should not the same kind of limitations apply to cable in a context where cable is growing and is about to take on a larger share of the market. Why should they be able to broadcast in excess of what a national network could show?

Mr. TURNER. Well, the networks may have control, or Pittsburgh may have control over certain games, but the Saturday afternoon games and the Monday night games clear in the market. There will be a game clearing. It may not be the local game might be blacked out, just like in football. The games do clear on the networks. So there are competing games in the case of the networks.

Senator SPECTER. But there is that ultimate control with the league, which takes into account the situation with a team like Pittsburgh. And if that is the prevailing rule as to network televising, why shouldn't it be the same as to cable?

Mr. WHEELER. Senator, could I try that one on for size?

Senator SPECTER. Sure.

Mr. WHEELER. The network rules, the network contract now, talks about the specific game. It says, if the network is showing the Pirates versus the Dodgers, you can't bring that game in. But it requires—the contract the leagues themselves sign—requires a substitution in Pittsburgh of another game.

We are not saying—as a matter of fact, this bill codifies the fact—that you cannot show on a cable system the same game being played in Pittsburgh. What the sports interests want is to say that you cannot show any game, and the difference is super critical, because in their contract with the network, they require that another game be brought in.

Another example of this is we have four cities where there are two baseball teams in the town. You go to those cities and you can watch both teams on television the same day. Now, if it is harmful to show a different game in the town where another game is being played, why is it that that happens currently in voluntary agreements between broadcasters and networks—and sports owners?

What they are wanting is they want to go beyond the concept of specific game exclusivity, which we agree they ought to have. They want to say you will get no baseball unless it is my baseball. They want to set themselves up so that they are controlling a third party's product, not their own product. And that is the difference between this and all the other exclusivity provisions in the bill where you control your own product and not somebody else's product.

Senator SPECTER. Thank you, Mr. Chairman.

Chairman PACKWOOD. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman. Mr. Effros, you just took yourself out of this deal.

Mr. EFFROS. Yes, sir.

Senator MATHIAS. I assume you took yourself out assuming that the Congress would not adopt legislation which, in effect, reversed the tribunal, right?

Mr. EFFROS. No, sir.

Senator MATHIAS. Are you unconditionally out?

Mr. EFFROS. I am out, except if there is a reversal of the CRT decision.

Senator MATHIAS. Well now, how do we do that? Mr. Wheeler says you are in court.

Mr. EFFROS. Yes, sir.

Senator MATHIAS. You are down here in the U.S Court for the District of Columbia. Why should the Congress interfere with the judicial process? You know, I get letters every day from some irate father who wants me to get his children back for him. He tells me about the custody proceeding he is in. We send him a standard answer that Congress does not interfere with the judicial process.

Mr. EFFROS. The proposal that was made and outlined by Mr. Wheeler a few minutes ago and that was agreed to by Mr. Fritts does not ask actually for a reversal. It is a stay of the entire process until we can figure out what exactly the CRT is supposed to be doing in this situation; send the entire issue back to the CRT with specific instructions from Congress.

After all, it is Congress that wrote the law, not the courts. And if there is a confusion as to what the law now says, as to what the intent of Congress was with regard to setting these rates, it should be Congress that tells the rate agency what it meant. And that is all we are asking; that the entire decision be stayed at this point, Congress clarify its instructions to the CRT.

In any event, if this bill were passed without that amendment, the CRT would have to start another proceeding anyway on rates, so we are still back at the CRT with rates. We are asking that the entire package be done at once after Congress clarifies its intentions.

Senator MATHIAS. Well now, the Congress said originally that the CRT should set the true marketplace rate; right?

Mr. EFFROS. No, sir, I do not believe it said it that way.

Senator MATHIAS. What do you think it said?

Mr. EFFROS. I believe that the mandate of the CRT was to—was consistent with the law—to set rates that would allow cable operators to carry signals, taking into consideration the valuation of the signal as well as its value to the public.

I think it only considered one of those two things. It said we have decided a market rate in this case of 3.75 percent of gross subscriber revenue. That happens to be about—well, it is at least five times more than we are paying for any other similar type of program. So we could get into a huge argument as to whether they really set a true market rate in the first place.

But that is immaterial. What is more material is that another part of the law that was adopted in this body said that they are to take into account the effect of imposing any given rate on the viewer. And as Mr. Wheeler and I have both pointed out in our testimony, the head of the Tribunal has specifically said they expect the results to be that the viewer will not be able to see the programing.

Well, that is contrary to the mandate of the law, which was designed to allow viewers to see the programing. We would not have needed the entire copyright law if the intent of Congress was to say we do not want the American public to see television programing, that is independent programing in distant markets.

Senator **Mathias**. I have not read the record of that proceeding, but tell me, was this argument raised with the Tribunal?

Mr. **Effros**. These arguments all were raised with the Tribunal. Of course, the argument that they have decided to take the signals away could not be raised until after the Chairman made the statement on the day that they announced the decision. The Chairman of the CRT made the statement that he expected signals to be taken off the day that the decision was made.

Senator **Mathias**. But this general line of argument was presented?

Mr. **Effros**. Yes, sir.

Senator **Mathias**. Thank you, Mr. Chairman.

Chairman **Packwood**. Senator Dole?

Senator **Dole**. I just had a question, I guess, to the Chair. Is it my understanding that you hope to conclude this hearing and have the markup and pass this yet this year?

Chairman **Packwood**. We will have a markup on Monday. I think you have one set in Judiciary on Wednesday, and whether we conclude it or not I do not know. I hope so, but we may or may not. We will plow on ahead.

Senator **Dole**. It just seems like a rather nervous coalition.

I do not dare ask a question.

Chairman **Packwood**. Senator Exon?

Senator **Exon**. Thank you, Mr. Chairman. I want to echo the last comments by my colleague from Kansas. I told some of them the same thing yesterday, although I did not use the nice words. I wish to file an objection with the Chair. I do not mind going into joint conference with the Judiciary Committee, but I object to your putting the Judiciary Committee on the Democratic side of this table.

Let's assume that the grand compromise goes forward. Let's assume that the CRT matter is successfully resolved. Let's get down to the matter that you have already responded to one question on; the matter of sports being broadcast almost everywhere. What provisions do you understand are in the bill to give any protection at all to a particular sporting event in a particular city being possibly harmed by competition coming in from the outside?

Mr. **Wheeler**. Is that directed to me?

Senator **Exon**. Anyone who wishes to answer.

Mr. **Wheeler**. The concept that is in the bill is the concept that is currently in the FCC rules, and that is protection against the same game being brought back in. And there is a reason for that being in the bill.

The broadcasters and the program producers have what is termed "exclusivity protection" there. The exclusive users of the product in a particular market, they wanted that when they brought MASH into a market; they were the only folks who were selling MASH in that market. They did not ask, if they brought MASH in, to be the only people showing sitcoms in that market.

And that is the difference between what is now in the bill, for both sports and the Hollywood community and broadcasters: specific exclusivity versus what sports is asking for, which is generic exclusivity. And the problem is that, you know, when you go through the history of this, you find that it was 1922 when the Supreme Court said that baseball teams could get together and have exclusive regional franchises, geographical franchises. And then, along came broadcasting: and broadcasting gave a consumers a way of getting more baseball than going down to the park.

And the teamowners came to Congress and said, "Give us an exemption from the antitrust laws so that we can get together, and withhold our broadcasting product, as well, so that we can get a maximum dollar for that;" and the consumer lost another option.

Now, along come some creative people like Ted Turner who say," Here is a way that consumers can have a choice as to whether to go to the park, whether to watch it on broadcast, or whether to watch it on cable." And the sports folks come back up and say, "No, wait a minute, we want to go back to the concept that if you are going to watch a baseball game, you are going to watch it where we want you to watch it, when we want you to watch it, and you are going to pay what we want you to pay for it."

And the problem is that what they are setting it up for, Senator, is for everything to go to pay television. Now, pay television is certainly one of the futures of cable television. But I think that there ought to be a mix. There ought to be a mix of consumers paying for seeing a sporting event on television, and if Mr. Turner wants to deliver his via a distant signal, they have that choice, as other teams would have, as well.

So I do not think we ought to be in a position where we are passing a law granting territorial exclusivity to sports teams so that they can then turn around to consumers and say, "The only way you are going to see it is either go to the gate or pay me for it. I do not think that is fair to sports fans.

Senator Exon. Well, let me follow up on that a little bit. I think you make a pretty good point, and certainly, years or so ago, I was approached on introducing something along the lines that you just outlined wherein a baseball team, for example, would have total control in a certain market area as to what other baseball games were shown, if and when—for example, in Cleveland, Ohio. If the Indians were playing at 8 o'clock at night, they could even prevent baseball from coming in there at 8 o'clock in the morning, or midnight after the Cleveland game was over, and I thought that was grossly unfair and gave them a monopoly that I do not think they are entitled to.

I have not made up my mind on this, but I am a little concerned about—and I am most concerned about—my constituents in Nebraska who have no professional sports. We have the best football team in the Nation but we do not have a professional team.

Senator Leahy. What State is that?

Senator **Exon**. The team that LSU is going to play in the Orange Bowl.

My point is, though, that I want to make sure that they have a chance for proper viewing: but, is there any reason to look at the proposition as to what is going to happen to the quality of the sports that you broadcast, if we get to the place where we do not have people sitting in stands and paying to go in, but have some television cameras sitting in all those 40 or 80 thousand seats in the stands?

Let me go one step further. I will give you an example. Certainly, with the announcement of Howard Cosell the other day with regard to one of the major networks, as I understand it, taking advantage of the boxing promotions to the extent where that has almost deteriorated to the place where the contests are far, far below the quality that we had expected from that particular sport. It seems to me, gentlemen, that we have to look somewhere along the line that historically—and maybe it is changing and that is why I want you to amplify on it—maybe it is changing.

But, historically, as I understand it, sporting events are basically paid for by the people who go and pay their way through those turnstiles. And the television, radio, and other communications media are an add-on thereto. Can you comment on that?

Mr. **Wheeler**. In the interest of the sport, how about we do Tinkers to Evers to Chance? And Mr. Effros talks about the impact in Nebraska, and then I have a feeling Mr. Turner would like to talk about the financial——

Chairman **Packwood**. I want to interrupt for a second, if I can, Jim. Strom has to go to a meeting and has not had a chance to say anything or make a statement.

Senator **Exon**. Go ahead, and we can come back. My time is up.

Chairman **Packwood**. Senator Thurmond?

Chairman **Thurmond**. Mr. Chairman, I am very pleased to join you here in holding these hearings. I had an important engagement with the FBI this morning on some law enforcement matters, and I have got to meet with the Vice President in a few minutes, but I will come back as soon as I can.

I would ask unanimous consent that my opening statement follow your opening statement this morning.

Chairman **Packwood**. Without objection.

Chairman **Thurmond**. I just want to say to the panels, the panel now up and other panels that are coming up, that there are a lot of questions involved. Now, this bill, as I understand it, has been agreed to by most of the people. I have had some people in my office who wanted some change one way and others who wanted it another way. However, unless this bill is accepted almost unanimously, it probably will not get through this session. Then there will be a big fight on it next year, and it may not go through at all.

So I would suggest that all of you think about it the best you can, and let's try to do what is best for the public interest. That is my job; that is the job of these committee members here. There is one thing: What is best for the public? It is not what is best for the broadcasters, it is not what is best for the cable people, it is not what is best for the education people, it is not what is best for any other group. But what is best for the public as a whole?

Now, people have come in and raised some points that appear to deserve serious consideration, but regardless of who raises what point, it comes back to one question: What is best for the public? That is the way I expect to vote when this matter comes up.

I will come back as soon as I can, Mr. Chairman.

Chairman PACKWOOD. Mr. Chairman, thank you very much. I am sure we will be going on when you get back.

Now then, if you want to try your Tinkers to Evers to Chance routine, briefly, if you can do it as fast as they can do the double-play, I would appreciate it.

Mr. EFFROS. Very briefly, sir, in terms of the results to markets without broadcast stations or without sports teams, such as your constituency and mine, for that matter, the viewers would lose the ability to watch most sports programing.

The reason for that is that in most cable systems outside of the major markets, which is where most sports teams are, the only way that we can bring in independent television to the public is via satellite. So it is the satellite-transmitted television signals that are of extreme importance to your constituents and to those viewers.

Those signals are the ones that will be blacked out most in the larger areas if the sports teams got the amendment they are now seeking. If those signals were blacked out to the point where it was to the economic detriment of the television stations that are being transmitted via satellite to carry sports games because they are basically being blacked out all the time, they would stop carrying those sports matches.

The result would be that in the areas where the blackout did not apply, we still would not be able to see the sport because the broadcast station would not be carried via satellite. So the ultimate result will be to eliminate sports in markets where there is no sports team.

Senator EXON. So what you are saying, then, your position as I understand it is there is no way that a compromise could be reached, in your opinion. It is either whole hog, all the hog or none; is that correct?

Mr. EFFROS. That is correct. If they want to black out all sports matches in a city, if they want to take control of all sports matches of the same sport in the city——

Senator EXON. Well, let's come back down to Earth. I will come back to this.

Chairman PACKWOOD. The runners are already safe at second and first, I can assure you. Go ahead and answer.

Mr. TURNER. Senator, we are the major operation in this thing, Superstation, WTBS, 30 percent of homes. We are in almost every cable system in your State, and because of us people in Nebraska get baseball that would have only gotten the Monday night games. They get the same kind of baseball that local television viewers in Chicago get in New York and in Atlanta. They get over 100 additional games, and they love them.

If the sports people got what they want—and 60 percent of the people in the whole country live in those major markets—and if our baseball games are blacked out, we are going to have to quit carrying the baseball games. We have 4,000 movies, too, that are not going to be blacked out because we have bought the rights to them, if the CRT decision is overturned.

We are the guys that really caused most of the trouble in this thing. We did it because our Government and the FCC and you all made it possible for us to try to compete with ABC, CBS, and NBC. And over the years, the power structure, as I am sure you are aware, has done everything they could to kill us.

But we cannot afford to be blacked out in the major markets because we will not have a network. So we would have to drop the baseball games so people in Nebraska and South Carolina and North Dakota and all the small States that have been getting good sporting events will lose the quantity and quality of sports events that they have been enjoying in the past. That is just exactly what is going to happen.

Chairman PACKWOOD. Senator Leahy, Senator Long, and then Senator Kasten.

Senator LEAHY. Mr. Chairman, when I look at this bill, when I read it in its present form, I think a great deal of it was drafted not here on Capitol Hill but elsewhere. I assume that that is being done by public-spirited people who do not want to overtax the Congress. A more cynical person might say that it looks like an appropriations bill on the last day of the Senate, one that sometimes is referred to in parliamentary terms as a Christmas tree bill. Just about everybody has got a little piece of the action, and they have grandfathered themselves in.

I think that considering what time of the year it is, it should probably be garlanded with holly and mistletoe and "Seasons Greetings" should be stamped on the front of it. And we will have the pages sing appropriate carols as they bring it in for our consideration.

You know, at the beginning of this Congress the Judiciary Committee, Mr. Chairman, heard from copyright owners and some telecommunications experts that it was time to abolish the compulsory license for retransmission of distant signals. About 2 years later, some of those same people were urging extension of the compulsory license into the foreseeable future. I note that the copyright owners, MPAA, have not come here to testify.

Now, what has changed in the last 2 years? Why the sudden major change? I mean, would we have been wrong if we had followed their advice right at the beginning of the last session?

Mr. TURNER. I can answer that question, Senator. Two things have happened. First of all, in this bill the copyright holders get the thing they want most, which is the ability to black out the same program that would be imported into adjacent markets. Programs like MASH that are sold in all 200 markets that currently can be brought from New York into Philadelphia, running at a different time, a different episode, and from Philadelphia into New York. Which hurts the broadcasters in both of those two markets, and also hurts the film company because it is so confusing, and that exclusive right for that same program is diminished.

And in our case, believe it or not, the MPAA has sort of reversed itself, as has the National Association of Broadcasters, who were vehemently opposed in the early days to WTBS. The reason that we were exempted by the MPAA is because we have adjusted to the marketplace and are paying rates in the open marketplace with the film companies. And we use the old copyright schedule to show them how much they would get over copyright during the years.

For instance, from Universal Pictures alone, we just recently bought the national rights to "Centennial" for $250,000 per episode. We also bought a number of motion pictures from them, and "Leave it to Beaver," and "Father Knows Best." They know those programs are going to be shown nationally, so the major problem that they saw now has become a customer. Superstation, WTBS, has become a fourth customer along with ABC, CBS, and NBC and they like that.

So those are the reasons that the MPAA has agreed to this new compromise, sir. But the CRT decision, from our standpoint, totally undoes it. But that is the reason the MPAA has agreed.

Senator LEAHY. Let me go to another question. I have talked with people all over the country regarding this bill, as I suspect most members of the committee have, and virtually everyone agrees that the phrase, "nonentertainment broadcast station" means religious broadcast station.

Now, why isn't the nonentertainment broadcast requirement a violation of the establishment clause of the first amendment? Don't we have before us a bill that mandates the transmission of religious ideas? Mr. Rose, would you like to address yourself to that?

Mr. ROSE. Well, first of all, I still have to disagree with that.

Senator LEAHY. Disagree with which part? With the phrase "nonentertainment broadcast station," that it was put in there to mean religious broadcast station?

Mr. ROSE. No, sir. What I disagree with is the statement that——

Senator LEAHY. You do agree with that part, though?

Mr. ROSE. I would agree with that part, yes. But again, the religious broadcasters stepped forward. Now, it may even be that most of the nonentertainment programers in the country that would fit—I don't know, I couldn't answer that question.

Basically, what we are talking about are stations that are offering programing, whether it is public affairs or other types of programing that is meeting a public need, that there is viewership for, and is striving to do what we have felt the FCC has said we should be doing, which is meeting the public need.

And we feel that we have been doing a good job of that. And then all of a sudden, we are facing the point of almost being penalized for that. So I don't see it so much as a religious broadcasting issue as the stations that are offering a different kind of programing that is, in fact, meeting other needs.

PBS would be another example.

Senator LEAHY. Yes, but if you have numerous stations carrying religious programing in an area, aren't you asking the cable operator to choose among religious persuasions?

Mr. ROSE. I do not know. I am trying to think of a market in the United States where that choice would need to be made.

Mr. EFFROS. Senator, we think it is a violation of the establishment clause.

Senator LEAHY. Thank you.

Chairman PACKWOOD. Senator Long.

Senator **Long**. I suppose I want to address myself to Mr. Turner. When we look on these TV games and hear this fellow read this thing that they always insist on reading coming down the home stretch on a football game, that this program is presented by ABC or whoever, and any replay, any broadcast or replay, can only be done with the consent of the broadcast or some such thing, to the best of your understanding as you are advised by your lawyer, do they have the right to tell me that I cannot record that program and play it back for the benefit of anybody I want to show it to around my house?

Mr. **Turner**. Well, I do it all the time, Senator.

In the hope that I will get a game where one of my teams won and I can look at it again on a night when we are having a bad game.

I think in the privacy of your own home, Senator, you can record anything you want to that comes into your house and play it back anytime you want. What they really mean—and no one would enforce that—what they really mean is that, for instance, if CBS is running the Super Bowl, that no other network could tape it and run it, you know, the next day or something and charge for it.

But as far as your private use is concerned, I do not think there is really anything they can do about it. I would not be too afraid of it.

Senator **Long**. Well, if I have to be afraid of it, I want to protect myself at the earliest opportunity.

Mr. **Turner**. If they come in and want to see your tapes, just tell them you are not going to let them see them.

You might have an X-rated tape there too, Senator. You don't want them to catch that. I have a couple.

Privacy of your own home.

Senator **Long**. The thought occurred to me that if Congress is looking after my interests or looking after 230 million people out there instead of looking after a few monopolists in this country, we could fix it so that anybody who wants to can tape that type of thing and show it to as many people as they want to show it to. He can bring in as many friends as he wants. He can even hire a hall and show it to as many people as would want to see it.

Do you find any quarrel with that?

Mr. **Turner**. I am for the most diversity for the American people, and I have been providing alternatives since I was allowed to by the Government, and I just want to be able to continue to do it. That is why I am here.

Senator **Long**. Well, I don't think the public would approve of us saying that when some fellow is given a monopoly right to go put something on the air, that he can put it on the air and still have it, still own it, and if someone wants to record it, that they can't use it for their own purpose. I don't think the people of this country would approve of that.

Mr. **Turner**. Yes, sir, I agree with you.

Senator **Long**. And it seems to me that I am willing to cooperate and protect these people with their motion pictures to some reasonable extent. If they want to make a good picture show, "Jaws" or "MASH" or whatever, and they want to charge you a fee to show it on your TV station, that is all right with me. I am willing to go along and cooperate with them on that. But once they put it out there on the air, it seems to me that they have lost control of it, and if someone wants to record it, he has got a right to record it and show it back as many times, as often as he wants to if he wants to go down there to the hospital auditorium or somewhere and show it to everybody who didn't see it.

I take it that you more or less agree with that position.

Mr. TURNER. Well, sir, that issue Mr. Valenti is bringing up, trying to get a tax on tapes, is not the issue here today. It is more retransmission of distant signals and this new copyright bill. This does not address the Betamax. This particular bill does not address or include the Betamax legislation that is, I think, pending in another area.

Senator LONG. Now, I just want to get it clear what it is you are trying to protect here. As I understand it, you are trying to present to the public entertainment that is football games, baseball games, and things like that that you would like to project?

Mr. TURNER. We are already doing it, Senator. We are all over your State of Louisiana on the cable systems there with both WTVS, which is primarily an entertainment network with ballgames and movies that we have negotiated for, and also with the Cable News Network 24-hour news channel. All we want is not to be able to be put out of business. This CRT decision puts us out of business.

Senator LONG. I don't know of anybody that wants to put you out of business in Louisiana unless he has an ax to grind. Oftentimes we hear all these discussions, we hear a bunch of monopolists come in here making their plans to cut the melon up and divide amongst themselves and wanting Congress to pass a law to be sure that no one gets a bite at it. But it seems to me that we are supposed to be here to look after the national interest, and I don't know of anybody that wants to take you off the air, Mr. Turner. I am just not aware of it unless he is one of the people at the table sitting beside you.

Mr. TURNER. That is right, nobody here is, but the CRT has effectively done it. They have knocked us out, and I didn't even go talk to them because I didn't figure that they would put us out. In the past all they have ever done is do inflationary things, which was OK, but they knocked us out because there is a limit to how many places I can go and be at one time. I have always figured that the battle would be won or lost with the Congress and the Senators, where it always has in the past, and you all have always protected us once you gave us the right to operate.

In other words, we never asked for distant signals or importation or anything like that, but when I read about it, the FCC and Broadcasting Magazine, I said I will try to create another network, the rules have opened up to make more competition and diversity, and I will go out there and fight ABC, CBS, and NBC, I might not win but I am going to try; and I have been doing a pretty good job.

Senator LONG. Please excuse me, but who is the CRT?

Mr. TURNER. That is a good question. It is called the Copyright Royalty Tribunal. I think Mr. Packwood can fill you in on it and his man over there. I had never met anybody on it. It is a group. I knew they existed, but I didn't know that they did anything. It is kind of like where were the Japanese on Sunday morning about 10 o'clock? Everybody knew where the heck they were.

That was Pearl Harbor for me and it happened on my 44th birthday, 2½ weeks ago, and I was in shock.

Chairman **Packwood**. I take it you are analogizing their recent decision to the attack on Pearl Harbor?

Mr. **Turner**. Well, at least they didn't attack Washington. They hit Pearl Harbor, not D.C. This is what knocks me out in one blow.

Chairman **Packwood**. Senator Kasten.

Senator **Kasten**. Mr. Wheeler, a couple of weeks ago or a month ago you all said or I understood the position of the NCTA to be that you would not support the bill if there were any amendments of any kind adopted in the Senate. At that point you were trying to block any hearings in the Senate. Has your position changed?

Mr. **Wheeler**. Since that time, a significant change has taken place in that the Copyright Royalty Tribunal has, to use Steve Effros' term, knocked the third leg out on this three-legged stool that was the agreement. If the agreement is to be made whole again, that has to be redressed and things have to be put back to the point that they were earlier before you adjourned for the election.

We would, however, continue to oppose other amendments to the bill which would, to use Senator Leahy's term, Christmas tree this and begin to add other special protections to what is a carefully crafted compromise.

Senator **Kasten**. So you support additional amendments if they deal with that Copyright Royalty Tribunal group and try to in your mind remedy that, but you oppose any other additional amendments?

Mr. **Wheeler**. Yes, sir.

Senator **Kasten**. And you would oppose any amendments that would be working toward any kind of a compromise, at least at this time? You are suggesting to the committees that you would oppose any efforts working toward any kind of a compromise on the sports question, whether it be blackouts? There are a number of different ways to go, and frankly, we are not all experts on that.

Mr. **Wheeler**. I know there are a number of different ways to go, and we have tried to go those ways and we have tried to compromise with the sports interests repeatedly. Chairman Dingell in the House has——

Senator **Kasten**. Have you within the last month, since I talked to your associate—and I can't remember his name right now, but the other person who is working with you, have you been in touch with the basketball or baseball or hockey people? Have you been meeting with them and calling them and working with them trying to find, during this time that we were in recess, trying to find a middle ground?

Mr. **Wheeler**. Yes, sir, through some of the owners, in fact some of the owners in your State, to see if there was a way to put together a compromise, and we note that that has not borne fruit, number one.

Senator **Kasten**. You are also working with people in Washington?

Mr. **Wheeler**. We have been trying to do it through the owners because every time we sit down with their people in Washington we get the position that they are floating, which is a position in extremism.

Senator **Kasten**. Mr. Chairman, my understanding is that this kind of negotiation, especially among the people that are the principal players, has not been going on, and I would like to echo what Senator Thurmond said, that it is clear to most of us that we began with a number of elements of a successful resolution of this set of problems, and it included cable, broadcast, film, religious broadcasters, and sports.

There is one group that is not at this table right now, and that is sports. I guess they are going to have a special panel later. But it seems to me that it is going to be very, very difficult for there to be some kind of a resolution of this problem if you continue to cut one element of the essential mix out; that we as legislators don't know all the answers but we recognize that there is one-fifth of the problem that has still not been negotiated through and solved.

I personally support this bill. I desperately want this bill for the work that you as cable have done with the broadcasters in particular. I think that is very, very important to the national interest. But I think, echoing what Senator Thurmond said, that it is going to be close to impossible for you to get a legislative solution in the time that you need and continue to cut out one important element of what we look to as a whole.

I would just suggest to you that whether they are being difficult to work with or difficult to meet with or whatever, that the solution is to sit down and work through this problem so that we as legislators can look at a bill that is more complete.

Mr. **Wheeler**. I understand your admonition, and with all due respect, I am not sure that it is that we cut out the sports interests or that they cut themselves out, because what they are asking for is in excess of what the other property owners are asking for.

Senator **Kasten**. In your opinion.

Mr. **Wheeler**. They are asking for generic exclusivity on product, whereas the essence of this agreement is specific program exclusivity. They have gained in this bill exactly the same protections that every other property owner has, whether it be broadcasters or movie producers or Norman Lear. They have exactly the same protections that those people found sufficient. They are asking for protections that go beyond that, that go to include all baseball games. And again, that analogizes to if you bring in "MASH," you don't block out all sitcoms.

So if we can work around that kind of a basic concept, I think we are good.

Senator **Kasten**. Thank you, Mr. Chairman.

Chairman **Packwood**. Senator Exon.

Senator **Exon**. Mr. Chairman, we have another panel, I guess, and I had some other questions, but I think we should move on.

Chairman **Packwood**. Senator Long.

Senator **Long**. Let me ask you, Mr. Wheeler. Does this bill give your people more monopoly rights than they already have?

Mr. **Wheeler**. I don't see where——

Senator LONG. Or more exclusivity, more exclusive rights than they already have? Let's call it that.

Mr. WHEELER. No, we are giving up our rights in order to give exclusivity to program producers, broadcasters, Norman Lear, baseball, the sports teams. We are losing what we have today as a result of the decision by the Federal Communications Commission, which is the right to carry an unlimited number of signals and to show all the product on those signals.

We are backing up reluctantly in this bill to a situation where we have to "Swiss cheese" a signal and carry only some of the programs, not all the programs. And thanks to the ridiculous decision of the Copyright Royalty Tribunal, we now cannot carry an unlimited number of signals. So what is going to happen, the position that we are put in, is the position of having less than we started out with. What is worse is the position that the consumers of Louisiana are being put in of having fewer signals; and then those signals which they do get look like Swiss cheese and they get just a black screen staring at them for one program because they have to black it out.

Unfortunately, we are regressing in this deal, and I think that some of the other cable witnesses who don't support the agreement will be very vehement on that point.

Senator LONG. I want to make it clear that as far as I am concerned, my feeling is about the type of thing that Senator Thurmond indicated. My feeling is that my first interest is to those 230 million people out there who spend a great deal of time viewing television.

Now, unless I am missing my guess, none of the people are losing any money. Is anyone losing money?

Mr. TURNER. [Raising his hand.]

Senator LONG. Well, if anyone is losing money, I want to know that.

Mr. TURNER. [Raising his hand.]

Senator LONG. I see your hand, Mr. Turner.

Because if someone is coming in here saying, look, now, we need help, we are on the ropes, let me tell you that I have got a lot of constituents who are really losing money these days. They are getting the worst of it. So if anybody is in that situation, I want to consider it on that basis. But if we are being asked to do something on the basis that this is good for America, then I want to consider it on that basis also.

Mr. FRITTS. Senator, I would like to amplify on exactly what you are saying. No. 1, I think we may have lost sight of the Copyright Royalty Tribunal in some of the amplifications that have been mentioned here today. The proposed amendment as proposed by the National Cable Television Association to this agreement which has been so fragily constructed does not change the Copyright Royalty Tribunal. It leaves it to the courts to decide. It simply stays the effective date of it, No. 1, simply stays the effective date of the Copyright Royalty Tribunal, and the courts will decide that on appeal.

No. 2, the sports interests. With this bill the sports programing as we know it today, as you know it, sir, in Louisiana and each of your respective markets, will remain the same. With this bill there will be no change in the current sports programing that is allocated on television as you know it today, as it is constructed now, and I think all of us agree that we have seen and we have a plethora of sports programing to watch and it is healthy and good for America.

I go back to what Chairman Thurmond mentioned earlier and my earlier statement that the chief beneficiary of this legislation will, in fact, be the viewing public because this bill assures the vitality of the broadcasting industry, the cable and the production industries, and it, in fact, encourages the maximum diversity of video programing sources in the American public's homes.

Senator LONG. Well, you have a man sitting over there at the end of the table who just got through saying that this would deny him the opportunity to compete. Now, I personally think that if some newcomer comes on the scene and wants to do the same thing he did, that that might be good for the country.

Mr. FRITTS. Excuse me, sir. I think he means that the Copyright Royalty Tribunal decision effectively denies him the right to compete. However, this bill does not. In fact, it makes him whole where he can, in fact, compete.

Senator LONG. Mr. Rose.

Mr. ROSE. Mr. Chairman, Senator, there is one thing, Mr. Long, one thing that I feel I should say at this point. I came feeling that at least we had something together, and I can see part of the problem, I assume, with the CRT. But at the same time there has been an awful lot of work that has gone into this over the past few months with the staff of the Congress and so forth, and I think I am more troubled over what for lack of a better term I would almost say would almost be a lack of good faith on the part of Mr. Effros.

It seems, where we had at least thought that we had worked out an adequate compromise that we could come to this group with and say at least was worked to this point, now what I am hearing is that perhaps not only is Mr. Effros concerned about CRT, but he has taken a step backwards on what we had thought we had worked out, a very solid compromise. I don't think that is good for this body.

Senator LONG. Let me make this clear to you, Mr. Rose. I am not in bad faith about anything. I am not in on this. I didn't make any deal with anybody, and I don't even know what deal you have made up until now. So when I find out about it, it may be something I can vote for and it may not.

Mr. ROSE. I understand that.

Senator LONG. I want to make it clear to you, to everybody here that I couldn't care less what deal you made with somebody, and why he agreed to this, and why somebody agreed to that. What concerns me is whether this bill is good for the country, and if this turns out to be a bill to enthrone monopoly, it is going to have to take its place in line and wait its turn. We have 10 other monopoly bills sitting out there waiting to be called up.

Mr. ROSE. Sir, I understand that. What I am saying is I feel at least that we should come here with our act together before we come before this body, and that part of it disturbs me.

Chairman PACKWOOD. Gentlemen, thank you.

We will move on to the next panel, Mr. Kuhn, Mr. Stern, Mr. Stein, and Mr. Ehrhart.

Mr. Stein, I indicated that you could go first at the request of Senator Specter. I am sorry he couldn't stay. We will wait just a moment until our spectators move out. [Pause.]

Let me indicate what the plans are. I have to chair another hearing starting at 1:30 and I need about 30 minutes preparation time for it. I have arranged for another room for that hearing, and these hearings will go on right through the lunch hour, and I will try to get somebody else to preside if I have not finished by 1. But if we are going to have any bill—we may not have any bill anyway. I can't tell from the way the different opinions are going. But if we are going to have a bill, we have to finish these hearings today.

Mr. Stein, go right ahead.

STATEMENTS OF BOWIE K. KUHN, COMMISSIONER OF BASEBALL; DAVID J. STERN, EXECUTIVE VICE PRESIDENT, BUSINESS AND LEGAL AFFAIRS, NATIONAL BASKETBALL ASSOCIATION; GILBERT STEIN, VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL HOCKEY LEAGUE; AND STEVEN E. EHRHART, COUNSEL TO THE COMMISSIONER AND DIRECTOR OF ADMINISTRATION, U.S. FOOTBALL LEAGUE

Mr. **Stein**. Thank you, Mr. Chairman. I appreciate that our statement, the formal statement that was submitted, will be made a part of the record without my having to refer to it at this point, and I would like to use the brief time allotted to me to discuss some of the things that I have heard here today.

Chairman **Packwood**. All of your statements will be in the record in full.

Mr. **Stein**. Yes, indeed; thank you.

I heard first Representative Kastenmeier read his statement, and he closed saying that if we failed to enact H.R. 5949 at this time, he doubts whether we will be able to put the pieces together in the next Congress. I have to say when I heard that, I asked why. If it is such a fair deal to all concerned, why are they so concerned that it has to be stampeded through at the 11th hour? If there is fairness and equity in this deal which is called H.R. 5949, then they should be able to put those pieces back together in the next Congress with ample time to do so, and I think this body should question why the stampede is going on.

I would like to comment a little about Mr. Wheeler and his charts. He showed the stairsteps, I believe. I did not see the chart—I was in the back there—showing the declining value of additional distant signals, and I think all that does is point up graphically and dramatically how inequitable the statutory rate is for the first signal.

The first signal, according to the statute, says that if you are going to import a distant signal, you have got to pay six-tenths of 1 percent of your gross receipts into the pool, and now the Copyright Royalty Tribunal, after extensive hearings several years after that initial statutory rate was set, has decided that the value of a third or fourth additional signal that is imported in the marketplace is 3.75 percent.

Now, I heard all this screaming about the Copyright Royalty Tribunal's decision, and the Copyright Royalty Tribunal did not say that if you want to use an additional channel, you are going to have to pay 3.75 percent. If they are unrealistic as far as the marketplace value, then nobody will take that channel.

What the CRT said in the recent hearing was that if you want to take it without negotiating for it, this is what you will pay. And if the 3.75 is unrealistic because it is excessive as far as the marketplace value is concerned, then they won't take it and they will go to the people who own the program rights and they will negotiate.

But the sad part of it is if it is less than fair market value, the people who own those rights have no chance, and that is the way the situation is and has been under the old statutory rate. We have no chance. If the amount of money that we are getting out of a broadcast is less than what the market value is, we have no choice; we have got to take that.

Ted Turner, charming rascal that he is, I think inadvertently misled you. He says that this new Copyright Royalty Tribunal decision puts him out of business. I think we all know he is never going to be out of business. He said, however, that the only reason the sports people were not included in the original compromise was because they wanted total control to market their pay packages, and I would like to know how do these people know what the sports position would have been in an ultimate compromise if they wouldn't let us into the room, if they closed the doors of the compromise room where they worked out that compromise and they wouldn't even let us in.

Chairman PACKWOOD. Can you tell us now what it is you will want? Because we are going to have to write this bill.

Mr. STEIN. Yes, indeed; I would like to get to that in a minute, Senator.

Also, Mr. Turner said that H.R. 5949 does not affect the key issue, which is that what sports wants is total control to market their pay packages. Well, under the existing litigation we have that. If we are just going to go and pay and have total control—we have total control now over pay packages. This bill isn't hurting us with regard to our proprietary broadcasts. This isn't hurting us with regard to cable packages. Where we are being hurt under the present system, and why if there was a relief to be afforded pursuant to an amendatory process, we should have been considered, is that we are being hurt in the broadcasts we are putting over the air.

Now, you talk about what kind of relief sports wants. Certainly from hockey's point of view—and Senator Long, you talked about people losing money. Well, we have people losing money. We have teams in Pittsburgh, we have a team in Washington, D.C., we have a team in St. Louis, we have a team in Buffalo and Detroit, we have teams losing money all over this country. The only way to survive in the hockey business today is to put on the kind of product that will attract fans to your game and that will attract the fans to watch your television product, and you have to be able to sell the television product.

What sports is saying is looking at—and Mr. Wheeler talked about generic and specific exclusivity, and his analogy is all wet because the generic exclusivity he says is we say, well, you can't put on "MASH," we don't say you can't put on other sitcoms. But what he is not focusing on, and perhaps he is not aware of this, is that what they are saying in specific exclusivity for syndicated programing is that you cannot put on any other program of "MASH."

It is not "MASH" chapter 1 going against "MASH" chapter 1, such as he is saying for us. You had game 1. You can't bring back game 1. He is saying you can't have "MASH"-1 going and you can't import, if you have "MASH"-1 going, to "MASH"-2, some other chapter that has nothing to do with the one being shown.

We are saying if that is what he calls specific exclusivity, then we want that for sports because specific exclusivity would be if the Washington Capitals are playing here, then other hockey games in the National Hockey League and not other sports, not other football games, not baseball games, not basketball games, not sports as a generic situation, but just other hockey games in this particular sports league, just as other chapters of "MASH" in the national league, so to speak, not be brought in. That is what we are seeking.

Chairman PACKWOOD. Let me repeat and make sure. If it is baseball—and you can speak to this, Mr. Kuhn—you don't want any other baseball games being brought in. If they want to bring in a basketball game, that is fine.

Mr. STEIN. Absolutely, Mr. Chairman.

Chairman PACKWOOD. I have got to stop you. I have held the panelists to 5 minutes.

Mr. STEIN. I didn't think I had gone 5.

Chairman PACKWOOD. You have.

[The statement follows:]

STATEMENT OF GILBERT STEIN, VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL HOCKEY LEAGUE

Mr. Chairmen and members of the Committees, I am Gilbert Stein, Vice President and General Counsel of the National Hockey League. I am presenting this statement on behalf of the National Hockey League and John Ziegler, its President. Mr. Ziegler was unable to attend this hearing, but he did want me to convey to you how important the NHL considers this legislation and how much it appreciates this opportunity to present its views.

The NHL cannot support H.R. 5949 in its present form because it does not resolve the concerns the League has regarding its exclusive right to control the use and sale of its products—its games. This bill represents the private interests of several parties presently supporting its passage—the cable industry, broadcasters and motion picture producers—all of whom were provided the right of prior approval by the bill's author. Unfortunately, the bill was drafted without any input from sports interests, which are vitally affected by the subject matter, and does not include any provision to counter the present inequity of NHL clubs being denied the right to control the use and sale of their games.

The NHL believes cable's compulsory license for sports telecasts should be eliminated and cable operators should be required to enter the marketplace if they wish to purchase sports programming, just as over-the-air broadcasters do, and just as cable operators would be required by the bill before you to do for certain other programming.

We believe the present compulsory license system, under which cable operators may expropriate games played on "free" television without the consent of any of the affected parties is particularly harmful to sports, is anticompetitive, and can no longer be justified by the economics of today's cable television industry.

National Hockey League clubs presently rely upon two primary revenue sources, neither of which is alone sufficient to maintain a viable hockey club in today's economy. The first is fan attendance through the live home gate. The second is the logical extension of the home gate—revenue derived from local television contracts in the team's home area. The continued uncontrolled importing by cable operators of hockey games into a team's home area at any time, without regard for its effect on these two revenue sources, will cause serious harm to the clubs and the NHL.

National Hockey League clubs play on the average to roughly 80 percent capacity in their arenas. The home gate is one of the two primary sources the clubs have to generate income in order to pay their players' salaries and other expenses. Unfortunately, NHL clubs have no protection from the importation of over three-hundred regular season NHL games that are televised and retransmitted to distant cable systems, both regionally and nationally, often in direct competition with a home game. The importation of the panorama and excitement of outside hockey games, particularly those that may involve more attractive teams, dilutes home game attendance and the value of the home team's broadcasts and threatens to erode the local basis of public support.

Both Congress and the courts have concluded that sports leagues should have the right to restrict direct broadcasting of league games into the home territory of a member team when that club is playing at home. Both Congress and the courts have recognized the resulting harm such competing telecasts may cause with respect to attendance and have permitted limits to be placed on such broadcasts. The NHL believes that restrictions, similar to those now placed on direct broadcasts, should be applied to cable-imported broadcasts as well to protect a club's live attendance.

The importation of distant signal games also has a serious effect upon actual and potential local television revenues. The value of a local television hockey package is substantially reduced when a cable system imports other hockey games in direct competition with the local package at a fraction of the cost that the local broadcaster, who deals in the open market, pays. If an NHL club is unable to deliver an exclusive television right to hockey games in an area, then the value of any package is diminished.

The interest the NHL is seeking to protect—exclusivity—is more important to sports than all other program suppliers. Movies and television shows can be rebroadcast over and over with only slightly diminished appeal. Hockey games, however, like other sporting events, do not retain their appeal once a winner is declared. They have little rebroadcast value. Yet the House has chosen to ignore the protections for exclusivity necessary to sports while granting them to other programs with less need. H.R. 5949 recognizes the importance of protection of a producer's property and programming by eliminating the compulsory license for importing certain distant signal syndicated programming. The same principals which support the syndicated exclusivity provisions now in the bill with respect to movies and television shows would support their application to sports shows. We urge these Committees to recognize this and extend the synidicated exclusivity protections in the bill, to sports. It is neither logical nor fair for Congressional policy to be applied with the uneven hand manifest in the bill's present approach.

Producers of professional sports programs should enjoy the same protections offered producers of other entertainment program—the ability to control and sell their product in the open market for whatever someone is willing to pay.

The NHL is, of course, mindful of the political realities of the present situation. If the Committees are unwilling to eliminate the compulsory license or extend the concept of syndicated exclusivity to sports, there are lesser alternatives which, although not ideal, do offer some protection to sports' primary revenue sources: the live gate and television packages. These alternatives would provide a limited form of syndicated exclusivity by denying a compulsory license to import telecasts of NHL games when a club is playing at home or televising its away games back home.

The alternative protections we seek are narrow and limited in their effect on cable systems. They would apply to only a small number of cable systems, and only at certain times. All other cable systems could continue to enjoy the compulsory license. Even those systems located within a protected area could telecast games at certain times or by negotiating an agreement with the telecasting club.

Opponents of the protections sought by us will argue they would be "anti-competitive." The NHL believes it is the present system, which permits a cable operator to literally confiscate the telecasts of NHL games for a mere token payment, that is anti-competitive. Eliminating the compulsory license system would put competition back into the present structure by requiring cable systems to negotiate if they wish to use our product, just as they must do with other entertainment.

Hitherto cable television has been permitted to rebroadcast distant signals into a club's home area for virtually nothing. Whatever public policy may have formerly justified such permission has vanished. Compulsory licensing is an idea whose time has gone. Cable systems are now viable and should be required to negotiate in the market place for the right to profit from someone else's broadcast of sports events. The cable industry is no longer an orphan requiring federal protection. It is full grown and now represented by such large conglomerates as American Express, Warner Communications, Westinghouse, and others. Mr. Bernard Wunder, Jr., the Assistant Secretary for Communications and Information, U.S. Department of Commerce, described the current cable industry to the Senate Subcommittee on Communications, as follows:

> Cable television . . . enjoyed a year of substantial growth and achievement in 1981. The number of cable subscribers rose about 2.4 million, or about 60 percent more than just five years ago. Basic cable revenues were about $2 billion; pay cable revenues, derived from about 11 million subscribers, topped $1 billion. Not only was 1981 thus something of a banner year for the cable television business, but most expect the same to be true in 1982. Our forecasts call for an increase in the number of subscribers of about 2.1 million, and an increase in revenue of about $500 million.
>
> By 1986, we expect the number of cable subscribers to exceed 32 million, or about 40 percent of all television homes. Cable revenues in that year, counting both basic and pay, should be about $7.8 billion, or just a little shy of where the broadcast television business is today. By 1990, moreover, we forecast that more than 47 million American families will subscribe to cable television, and the business will enjoy total revenues of more than $14 billion.

In addition, the Chairman of the FCC, the Register of Copyrights, the Department of Justice, the former Chairman of the Copyright Royalty Tribunal and numerous members of the House supported elimination of the compulsory license system.

Cable television has come of age and the law should reflect the fact. It is more than inequitable to require a sports club, particularly hockey clubs, often operating at a deficit or only marginally profitable, to continue to subsidize the industrial giants of the cable industry.

The NHL believes the compulsory license cable operators presently enjoy should be abandoned and the free market allowed to prevail. Nonetheless, we believe there are amendments readily available representing a realistic compromise and with which all the affected industries can live. The NHL urges the Committee to repeal the compulsory license or to support at least the limited protection we seek. This would restore some balance to the relationship of cable television and sports.

Thank you very much.

Chairman PACKWOOD. Mr. Kuhn.

Mr. KUHN. Mr. Chairman, Senator Long, Senator Exon, I thank you for the opportunity to appear on behalf of professional baseball. Our problems here are very real and very difficult for us. We do not like the position of opposing a bill on which so much time and effort has gone into it to try to work it out; nonetheless, any bill which precludes the legitimate interests of a very, very important factor in the copyright picture is a wrong bill and should not be adopted until such time as all parties have a fair chance to participate in this bill.

We don't want to be dogs in the manger about this. I am very uncomfortable about in any way being made to appear a dog in the manger about this, but we think it is just absolutely dead wrong for us not to be included in here. And contrary to the statements of the cable people on the prior panel, we have not been given any kind of an opportunity whatsoever to participate in negotiations that led to the compromise that is represented to these committees in H.R. 5949.

Indeed, to put the bell properly on the cat, the cable people, who are very nice people and very easy to talk to in a social sense, have made it crystal clear to us that we do not have the political power to thwart them, and so long as we do not have the political power to thwart them, they will not deal with us. It is as simple as that. And make no mistake about it: that is the real answer, no matter what you may have heard earlier in the prior panel.

I am concerned that the sports people come here and are asked time and again—and I have testified many times on this so I know what I am talking about: Tell us how you are harmed; why do you need this; so what if hundreds of baseball games come into your market; so what if the new cable guy who is franchised in Boston says he is going to bring in 600 outside baseball games to the Boston market, which is three every day that the Red Sox are either playing or at home; so what, how are you going to be hurt by that?

We think all of the responsible agencies who have considered it, whether it be the NTIA or the Copyright Register or the committees of this Congress, as, for instance, when they adopted the Sports Broadcast Act of 1961, all recognize the telecasts coming into that home market hurt and hurt and hurt like the devil the professional baseball teams and professional hockey teams and basketball and soccer and so forth. There is no question about that.

And we think it is a little ironic that we are asked to show harm when the movie people, the other syndicated programers, found their way into this legislation, H.R. 5949, the broadcast people, and I don't remember anybody ever suggesting they had to show any harm whatsoever, and they are there. We are not there, and yet we are told that unless we come in, we must show harm. I think this is really unfair, wrong, improper, and nonsense.

I will take another step. We are asked in effect—I think it is well recognized and the CRT decision recognizes it—to subsidize the giant cable companies. We are very much struggling businesses in professional sports. There is no question about that. We are asked to subsidize General Electric, we are asked to subsidize Westinghouse, we are asked to subsidize Time, Inc., Warner Communications, American Express, and so forth.

Has anybody asked what harm it would do those giant profitable companies to pay a fair market value in an open marketplace for our products? Has anybody ever asked that question? I ask it, and I think that is the question we are entitled to have an answer to. That is one of the reasons we feel, Mr. Chairman, that we should be included in this bill.

I would point out to you——

Chairman **Packwood**. Let me interrupt because I don't understand. How is a local product here—and I will use the word "harm." You say pay for your product when another baseball team is being brought in on satellite and into the cable from some other town. That isn't your product, is it?

Mr. **Kuhn**. It is a baseball game, Senator. It certainly is our product if it is a baseball game. If a game is brought in by cable into Pittsburgh or by microwave relay into Pittsburgh, that certainly is our product. We don't want it brought in there. It is only because of the compulsory license that it is brought in there, and we oppose it and we think we are entitled to some protection. We come to this joint committee and ask for some protection so that we, like the syndicated programers, can be given the kind of protection that we think we are entitled to.

Mr. Stein has well described it. "MASH" is protected completely. A local independent television station may list up to 300 movies that it has rights to, and the cable companies cannot carry those movies, 300, and the cable companies cannot carry those movies during a 3-month period. What is different in that than the kind of thing we are asking for? We don't care about basketball coming into our markets, or football or hockey or soccer or anything else. We do care about baseball coming in, Senator, and that is the guts of our argument.

I think what is being asked here of these committees with regard to the CRT rate adjustment is one of the darnedest acts of arrogance I have ever heard. It is indeed the creature of the people who are now asking you to throw it out, and I think that is a disgrace and I don't think you ought to give it a moment's time.

Thank you, gentlemen.

[The statement follows:]

STATEMENT OF BOWIE K. KUHN, COMMISSIONER OF BASEBALL

I am Bowie K. Kuhn, the Commissioner of Baseball. I appreciate the opportunity to testify on behalf of Major League Baseball, concerning H.R. 5949, the Cable Copyright and Signal Carriage Act of 1982.

This bill represents a legislative ratification of a private compromise which modifies the cable television compulsory license provisions of the Copyright Revision Act of 1976. The agreement was negotiated initially by the Motion Picture Association of America ("MPAA"), the National Association of Broadcasters ("NAB") and the National Cable Television Association ("NCTA"). These groups ultimately sought to accommodate certain of the other affected parties. The professional sports leagues, however, were excluded from the compromise. And we were unsuccessful in our efforts before the House of Representatives to secure a fair measure of protection for our property rights in sports telecasts.

We stongly urge that the Senate not adopt the compromise embodied in H.R. 5949 without resolving the problems caused by the compulsory licensing of professional sports programming.

I. SUMMARY OF POSITION: H.R. 5949 SHOULD NOT BE ENACTED WITHOUT RESOLVING THE PROBLEMS CAUSED BY THE COMPULSORY LICENSING OF PROFESSIONAL SPORTS TELECASTS

A. The professional sports leagues have consistently opposed compulsory licensing on the ground that it results in an unwarranted expropriation of our very valuable property rights

From the very beginning of Congress' consideration of copyright liability for cable, the professional sports interests have advocated a true marketplace approach to the problem. We have always taken the position, and it is one which we believe very strongly, that the compulsory licensing provisions of the Copyright Revision Act of 1976, 17 U.S.C. § 111, result in the unjustified expropriation of our valuable property rights without adequate compensation.

Some indication of the vast disparity between cable's statutory compulsory licensing rates and true marketplace compensation can be seen in a recent decision of the Copyright Royalty Tribunal. After evaluating an extensive amount of evidence submitted by the sports clubs, other copyright owners and the cable industry itself, the Tribunal concluded that the statutory rates fall far short of providing true marketplace compensation. The Tribunal found that, in a free marketplace, a cable system would be required to pay 3.75 percent of its basic receipts for each "distant signal equivalent" that it imports—or between 5 and 16 times what the largest cable systems would pay for the same programming under the statutory rates (as adjusted by the Tribunal for inflation) and upwards of 100 times what the smallest systems would pay. (See below.)

As discussed below, the compulsory license forces us to sell each of our telecasts to the average cable system for the grand sum of $3—or less than the typical cost of a single ticket to the bleachers. This huge subsidy is provided—not to some struggling, philanthropic "mom and pop" operation—but to the likes of Time, Warner Brothers, American Express, General Electric, Westinghouse and the other corporate giants that dominate the dominate the cable industry. We are required to underwrite these conglomerates even though certain of our clubs are fighting for their economic survival and others are just barely able to make ends meet.

More important than the issue of compensation, we have lost our fundamental entrepreneurial right to control the distribution of our own product. And this will have a significant adverse impact on our traditional sources of income—the home gate and marketing of broadcasting rights. In order to protect these sources of income, our clubs may have no choice (under the present compulsory licensing system) but to turn away from their basic reliance upon free, over-the-air television in favor of media over which they can exercise a measure of control—such as pay cable and subscription television.

We face special problems because live sports telecasts are unique among all programming fare. Sports events are current and ephemeral; unlike most other programming (particularly movies and syndicated shows) which can be shown time and time again, and from which revenues can be derived repeatedly, a live sports telecast has little or no value after the game is played. We must earn income from our product at the time it occurs, or not at all. Thus, the unrestricted importation by cable television systems of distant signal sports telecasts into our clubs' markets significantly undercuts our ability to derive revenue because it competes unfairly with our home gate, our over-the-air telecasts and our cablecasts. Indeed, the injury increases over the long-term because hometown fan loyalty—upon which a club's home gate and broadcasting revenues depend—is eroded by the saturation of the club's market by the repeated cable retransmissions of the games of other clubs.

For these reasons, throughout the decade-long debate on the copyright revision legislation, and since the enactment of the 1976 Act, the professional sports leagues have maintained that compulsory licensing is inappropriate for sports telecasts.[1] We have been closely involved in seeking an equitable resolution to the controversy created by cable's expropriation of our programming. We have persistently advanced our requests for fair treatment before the Congress, before administrative agencies, and before the courts.

B. H.R. 5949 not only fails to address our concern over compulsory licensing, it worsens our position for the benefit of those who are parties to the compromise embodied in this bill

Notwithstanding our direct and visible interests in this area, we had no role in the formulation of the compromise embodied in H.R. 5949. It was negotiated without our direct involvement by representatives of other industries that have neither the responsibility nor the inclination to accommodate our legitimate concerns. It was entered into by only certain of the affected parties to protect their interests and their interests alone. Thus, it is hardly surprising that the compromise makes no attempt to deal with the concerns of professional sports, whereas it provides something for the constituencies of the MPAA, the NAB, the NCTA, and others, including even the collegiate sports interests.

Pursuant to this agreement, the syndicators would receive a measure of protection which, in certain important respects, is even greater than that afforded by the FCC's now defunct syndicated exclusivity rules. The broadcasters would ensure the otherwise questionable survival of the FCC's "must carry" and network nonduplication rules, as well as secure the benefits of syndicated exclusivity. Moreover, there are a host of unprecedented provisions which provide for special treatment of religious broadcasters, public broadcasters, "superstations" and collegiate sports groups.

The agreement also permits the cable industry to preserve a compulsory licensing system which the Register of Copyrights, the Department of Justice, the Department of Commerce, the Chairman of the FCC and others have persuasively urged the Congress to eliminate.[2] The NCTA would ensure that cable operators have the right to carry as many distant signals as they desire, pursuant to the FCC's recent deregulatory action. And it would thwart efforts to amend a fee schedule which is indisputably inadequate.

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[1] For a number of years prior to the passage of the 1976 Copyright Revision Act, bills to provide for a comprehensive revision of the copyright laws exempted entirely professional sports from compulsory licensing. Those responsible for this exclusion correctly recognized that sports programming deserves "special consideration" because of its unique ephemeral nature and because "[u]nrestricted secondary transmissions by CATV of professional sporting events could seriously injure the property rights of professional sporting leagues in televising their live sports broadcasts. Unregulated retransmissions of live sports events could also have serious consequences on gate attendance, such as major and minor league baseball games." Senate Judiciary Comm., 93d Cong., 2d Sess., "Draft Report to Accompany S. 1361" at 33 (1974); Subcomm. on Patents, Trademarks and Copyrights of the Senate Judiciary Comm., 91st Cong., 1st Sess., "Draft Report to Accompany S. 543" at 29 (1969).

These legitimate concerns are, of course, essentially the same as those which led Congress to enact the Sports Broadcast Act of 1961, 15 U.S.C. §§ 1291 et seq.

[2] See, e.g., Besen, Manning & Mitchell, Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem, 21 J. Law & Econ. 67 (1978); Shooshan & Jackson, Inc., Cable Copyright and Consumer Welfare: The Hidden Cost of the Compulsory License (1981); Brotman, Cable Television and Copyright: Legislation and the Marketplace Model, 2 J. Comm. & Ent. L. 477 (1981).

But when it comes to the concerns of the professional sports clubs, the agreement is silent. There is nothing in the agreement that affords sports any control over the saturation of our markets with distant signal sports telecasts. The agreement contemplates that sports alone will have to contend, without any compensating protection, with all of the added problems caused by the FCC's deregulation of the cable industry and with the recent, dramatic changes in cable technology and marketing practices—that is, the very factors which have prompted H.R. 5949.

The absolute irony—and, indeed, inequity—of the compromise is that it not only fails to deal with our problems, but actually worsens our position. It intensifies the problems that exist; it creates new ones; and it deprives us of certain of the minimal rights that we possess under existing law. For example:

As a result of the syndicated exclusivity protection afforded by the agreement embodied in H.R. 5949, sports programming will become even more attractive to the cable industry. Cable operators will choose distant signals with substantial amounts of live sports programs because these programs will not have to be deleted. And when deletions of syndicated programming become necessary, cable systems will seek to substitute sports programming because it will be available and unprotected. What equity is there in an arrangement which requires sports to contend with the even greater uncontrolled and unconsented-to proliferation of their product just so that the MPAA's constituency can gain the benefits of exclusivity when it markets its product?

No one can seriously argue that the existing compulsory licensing fee schedule—which the MPAA and NCTA negotiated in 1975 without our involvement and over our objections—is anything but grossly inadequate. The compromise embodied in H.R. 5949, however, not only fails to make any provision for a realistic fee schedule; it will actually result in a reduction in the size of the royalty pool from which sports' share must be taken. It does so by (1) eliminating the "minimum payment" which the law imposes upon cable operators; (2) allocating a substantial share of royalties to public radio without their having to justify such a share before the Tribunal; and (3) restricting the Tribunal's authority to adopt reasonable royalty rates to account for FCC deregulation. Obviously, the fees that have been negotiated away by the MPAA and NAB are not the exclusive province of these groups, but belong as well to sports. The MPAA and NAB have no right to relinquish our share.

The compromise embodied in H.R. 5949 will require the Tribunal immediately to reassess the marketplace rates which it adopted only last month to account for FCC deregulation. The sports interests were successful in persuading the Tribunal to adopt rates—albeit for a very limited category of distant signals—which come infinitely closer to providing true marketplace compensation than do the original statutory rates. H.R. 5949 would change the rules under which the Tribunal had operated and mandate reassessment of those rates under even more restricted authority. Thus, the result for which sports worked so hard before the Tribunal would be undone.

The agreement embodied in H.R. 5949 is manifestly anticompetitive and discriminatory against sports; it contemplates that the sports clubs will be the only program suppliers who cannot receive the substantial economic benefits of guaranteeing exclusivity. Under the agreement, a network can promise its affiliates exclusive rights to the network's programs; likewise, syndicators can promise their licensees exclusive rights to particular syndicated movies and series. But a professional sports club cannot even promise exclusivity for its own games because cable systems are free to import the other clubs' telecasts of those games, in addition to the plethora of telecasts involving other league members.[3]

The compromise embodied in H.R. 5949 would effectively deprive the Supreme Court of jurisdiction to consider a copyright challenge by one of our clubs—the New York Mets—to the activities of resale carriers which deliver superstations to cable operators without paying any compensation to copyright owners. The Mets were successful before the district court. While the district court's decision was overturned by a court of appeals, the matter will soon be before the Supreme Court.

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[3] H.R. 5949 would, of course, codify the FCC's "Sports Rule" which the Register of Copyrights himself has testified is insufficient. Indeed, if a club's "flagship station" televises a particular home game, the Sports Rule authorizes cable systems in the club's market to import the visiting club's telecast of that game. The Sports Rule also authorizes these cable systems to import the telecasts of any of the club's away games that may be presented by other league members. The inadequacies of the Sports Rules are discussed further at pages 37–38 below.

Through a last-minute addition to H.R. 5949, without any hearings whatever, a House Subcommittee accepted the NCTA's proposal to overrule the district court decision and therby short-circuit the appeals process available to sports.

In short, despite the widespread rejection of compulsory licensing by a host of government officials with no economic stake in the controversy, the House has chosen to address this complicated problem by adopting a compromise reached by parties who have quite naturally focused on their own individual concerns. These parties have, of course, agreed to perpetuate the compulsory licensing scheme because they are able to deal, in a piecemeal fashion, with the problems which compulsory licensing poses for them. Whatever one thinks of this type of solution to a complex problem, it cannot be condoned unless all of the interested parties are a part of the agreement. This, however, is not the case with respect to H.R. 5949.

To achieve the protections that they want for themselves, the MPAA, NAB, and NCTA have fashioned a compromise which substantially and adversely affects the sports interests. They have done so without giving us anything in return and without making any meaningful attempt to deal with our concerns, particularly those caused by recent regulatory and technological changes. There can be no clearer evidence of the inequity and inadequacy of H.R. 5949.

II. BASIS FOR POSITION

A. *Continuation of the compulsory licensing scheme is an unfair expropriation of our property rights in the telecast of our games. It will ultimately lead to a lessening of the amount of live professional sports programming on free over-the-air television*

The cable industry has sought to defend compulsory licensing on the ground that it is necessary to ensure cable's continued access to distant signal programming. Ironically, the ultimate effect of Government-mandated licensing of sports programming, however, will likely be a reduction in the amount of such programming which is currently available over free, conventional television to the entire American public—more than 70 percent of which does not currently have access to, or cannot afford, cable television.[4]

The likely effect of compulsory licensing on the continued supply of over-the-air sports programming was well-stated in one recent independent study:

"*The compulsory license for cable systems threatens to destroy the traditional television distribution market for sports.* In the short term, it denies consumers programs which are not made available to some broadcast stations in order to prevent cable systems from distributing those programs in other markets. In the long term, as full liability media increase their coverage, the compulsory license could induce programmers to withhold sports events altogether from broadcast stations (and thereby from traditional cable subscribers) in favor of pay cable, STV, MDS and other full liability alternatives." [5]

The Justice Department, in its March 20, 1982 letter to Congressman Rodino, likewise notes that, unless compulsory licensing is eliminated, "program producers may opt for distribution technologies that provide more control over use than broadcasting." Similarly the Commerce Department's NTIA has urged elimination of compulsory licensing, noting in part that:

"*[S]ports programmers may be compelled to withhold their events from broadcast stations in favor of distribution mechanisms offering more control.*—Full copyright liability through pay cable multipoint distribution service or STV, with the possible net effect of denying rather than affording viewers more program choice." [6]

There have already been instances where compulsory licensing has resulted in sports clubs not making certain of their telecasts available to free television. [7]

Perpetuation of compulsory licensing of sports telecasts will make it even more difficult to preserve free, over-the-air television as a feasible marketing and revenue producing medium for the professional sports leagues. As I will detail below, the aspects of compulsory licensing which threaten to undermine the clubs' current reliance on free television are quite compelling.

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[4] Even by the end of 1986, estimates are that some 61 percent of the total U.S households will not be wired for cable. Department of Commerce, U.S. Industrial Outlook—1982 at 369 (1982).

[5] See Shooshan and Jackson, supra note 3, at 55 (italic added).

[6] NTIA, Cable Copyright: Alternatives to the Compulsory License at 31 (December 1981) (italic added).

[7] See Shooshan and Jackson, supra note 3, at 55.

1. Compulsory licensing deprives professional sports clubs of the fundamental entrepreneurial right to control the distribution of their own product

In addition to some 90 network telecasts over ABC and NBC, Major League Baseball clubs present each season nearly 1,600 telecasts over their local "flagship" stations. Many of these same telecasts are also carried by the approximately 125 broadcast stations which comprise the clubs' regional networks and which are licensed to the nation's smaller and medium-sized communities. The other professional sports leagues also present a substantial number of telecasts over the national networks and/or local television stations.

Under the current statutory and regulatory arrangements, cable has been able to expropriate each of these telecasts and to carry our programming across the country without the consent—indeed over the objections—of the clubs concerned. The professional sports clubs have thus lost all semblance of control over the distribution of the product which they have created.

Surely no one would suggest that a columnist who sells an exclusive story to the *New York Times* should be required, over his objection or that of the *Times*, to provide that story for a token fee, established by Government fiat, to the *Washington Post* or to newspapers in other cities. Nor could anyone seriously suggest that, because the Boston Red Sox licensed exclusive television rights to a Boston television station, an over-the-air broadcaster in another city should have the right to carry these telecasts without obtaining the consent of the Red Sox.

These traditional concepts of private property have, however, been unjustifiably and unfairly discarded for the sole benefit of the cable television industry. The current system allows the cable industry to deprive professional sports clubs and other program suppliers of the basic rights of any entrepreneur who has invested substantially and with great personal risk in the creation of a product—the rights to control the distribution of that product and to negotiate with those who seek to profit from the use of that product. Under the current system, these fundamental rights can be fully protected only when the clubs place their games on pay cable or subscription television.

Consider, for example, the situation of the New York Mets, who have recently negotiated a 30-year contract with a packager of sports cablecasts. Under this contract the Mets may make an increasing number of games available for distribution by the packager to cable systems. No one may retransmit these cablecasts without bargaining in the marketplace for their use. The Mets are thus able to control the distribution of their cablecasts and to negotiate a fair marketplace price for them. On the other hand, the Mets do not have this right with respect to each game that they place on WOR-TV, their current over-the-air flagship station. Without obtaining the consent of the Mets (or WOR), a so-called "resale carrier" thrusts the Mets over-the-air telecasts onto satellite and then sells these telecasts to cable systems located throughout the United States, including those in areas where the Mets may desire to market or not to market their product. Obviously, in determining the number of games to place on cable versus free television, there is a growing and natural incentive for the Mets, and other clubs, to choose the distributional medium which affords them the right of control.

2. Compulsory licensing permits cable to expropriate sports programming in a way which is destructive of the very concept of a professional sports league

Current statutory and regulatory arrangements not only deprive the professional sports clubs of their basic entrepreneurial rights; they also permit cable to expropriate the clubs' telecasts in a way which maximizes cable's profits, but is squarely contrary to the best interests of the clubs themselves. As the Register of Copyrights has correctly explained:

"[C]able importation of league sporting events broadcast on distant signals may undercut the home gate, the value of broadcast rights, and fan loyalty of another member club located in the same area as the cable system. The [Copyright] Office has concluded that adequate protection should [therefore] be afforded to sports leagues to minimize this potential damage." [8]

The Commerce Department's NTIA has similarly observed:

"*[S]ports telecasts stand apart from other commercial programming in that value is diluted by competing sports programming more than is nonsports programming.* First, a sports event has little or no 'replay' value. Second, a telecast of a local game attracts fans who might otherwise have attended; telecasts of other, more attractive games simultaneously with the playing of a home game similarly attract audiences and thereby potentially reduce gate related revenues, and also threaten local fan loyalties. Third, the well-being of any team depends on the well-being of the league and the viability of its competitors. Unrestricted telecasts of popular matches could diminish fan interest in weaker, local teams and regional matches."[9]

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[8] Statement of the Register of Copyrights Before the House Subcomm. on Courts, Civil Liberties and the Administration of Justice, 97th Cong., 1st Sess. 66 (July 15, 1981).

A sports club cannot exist unless it successfully cultivates the loyalty and support of its hometown fans. It depends upon these local fans to come to the ballpark and to view the club's games over television. Almost 75 percent of a Major League Baseball club's revenues are derived from gate receipts and from expenditures at the ballpark; an additional 13 percent comes from local broadcast revenues—obviously all of this is attributable to the local fan. A professional sports club (unlike other program suppliers) typically has only one chance to attract such fans to its games and thereby reap a financial reward for its labors—and that is at the time that the game takes place.

It is difficult enough for many clubs to attract fans and thereby maximize their limited opportunity to reap a financial reward. The process, however, becomes even more toublesome when cable systems import into a club's home territory literally hundreds of distant signal telecasts of other league members. Such oversaturation is no longer a mere possibility, but a concrete and troubling reality.

For example, the cable operator who was awarded the Boston franchise has promised to import some 600 distant signal baseball telecasts each season; this amounts to more than 3 telecasts each and every day that the Red attempt to attract fans to one of their home games or viewers to one of their telecasts. Consider also the Los Angeles cable operator who attempts to sell subscriptions to his system, claiming:

"For the first time you'll have a chance to see 400 major league games from everywhere! Both leagues, all 26 teams.

And all the action, complete and live, as it happens.

"It's Theta's biggest baseball season! And you can reserve your box seat now by installing Theta Cable TV."[10]

There have been a number of dramatic developments in the cable area that occurred subsequent to the passage of the 1976 Copyright Act which have permitted situations such as those in Boston and Los Angeles. for example:

Historically, cable systems served only those rural and mountainous areas which lacked adequate television reception. Recently, however, cable has become convinced that there is a pot of gold in every major urban market—the very areas upon which the clubs depend for gate and braodcast revenues. Indeed, each of the markets with a Major League Baseball franchise is now in one stage or another of the cable franchising process.

As explained below, over the last five years the FCC has all but completely deregulated the cable industry. Most significantly, it has removed all restictions on the number of distant signals that cable systems may import. The result is that there is no significant regulatory limit on the vast amounts of distant signal sports programming available for importation.

Perhaps the most important development, however, has been the creation and growth of satellite-delivered superstations with their significant amounts of professional sports programming.

In late 1976, after passage of the Copyright Act, Station WTBS-TV in Atlanta was placed on satellite. Today, WTBS reaches a phenomenal 23,324,000 subscribers—86 percent of the nation's basic cable subscribers and some 28 percent of the nation's television households.[11] Two other stations, WGN-TV (Chicago, Illinois) and WOR-TV (New York, New York), also have been placed on satellite. These signals reach some 9.4 million and 4.4 million homes respectively.[12] A prime characteristic of each of these stations is that it is a flagship not only of a Major League Baseball club, but of other professional sports clubs as well:

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[9] NTIA, Cable Copyright: Alternatives to the Compulsory License at 28 (December 1981) (ital added).

[10] The above is taken from an advertisement which Theta Cable placed in the April 5, 1981 Los Angeles Times. Theta Cable serves some 100,000 subscribers in Los Angeles and is wholly-owned by Westinghouse, the nation's third largest multiple system operator.

[11] Cablevision Magazine, Nov. 22, 1982, at 350.

[12] Cablevision Magazine, Nov. 22, 1982, at 350.

PROFESSIONAL SPORTS TEAMS CURRENTLY ON SATELLITE-DELIVERED SUPERSTATIONS[13]

Superstations	Teams	Annual telecasts
WOR-TV	Mets (Baseball)	100
	Knicks (NBA)	28
	Nets (NBA)	20
	Islanders (NHL)	20
	Devils (NHL)	6
	Rangers (NHL)	32
	Cosmos (NASL)	15
WGN-TV	Cubs (Baseball)	149
	Bulls (NBA)	10
WTBS-TV	Braves (MLB)	120
	Hawks (NBA)	47

[13] Baseball and NASL telecasts are for the 1982 season; NBA and NHL telecasts are for the 1982-83 season.

The professional sports interests have had over 30 years of experience dealing with conventional television. It is this experience which convinces us of the harm posed by the uncontrolled importation of such large numbers of competing telecasts. If we could successfully function with the clubs invading each others' home markets with their telecasts, the individual clubs would have long since changed out telecasting patterns to take advantage of the additional revenues which this extraterritorial telecasting would provide. However, as we have understood for years, the introduction of substantial amounts of competing telecasts over either conventional television or cable televison poses a serious threat to the very determinants of a club's success—to the following of its hometown fans as that is reflected in the size of its gate and the value of its broadcast rights.

The weaker teams in particular are susceptible to the potentially devastating effect of having their home territories saturated by a glut of sports telecasts from distant markets. And, as Congress concluded when it passed the Sports Broadcast Act of 1961, 15 U.S.C. § 1291 *et seq.*, "Should these weaker teams be allowed to flounder, there is danger that the structure of the league cold become impaired and its continued operation imperiled." [14]

3. Compulsory licensing unfairly deprives the sports clubs of the right to receive adequate marketplace compensation for the use of their telecasts by cable

There is no question that the cable industry derives a substantial economic benefit from distant signal sports telecasts. In the Spring of 1980 Arbitron, one of the nation's leading market research firms in the communications industry, conducted a survey to determine, among other things, the reasons why people subscribe to cable. Arbitron found that somewhere between 30 to 50 percent of the responding households listed distant signal sports as a principal reason for subscribing to cable.

The cable industry itself recognizes the immense value of distant signal sports programming in attracting and maintaining subscribers. This is perhaps best illustrated in the promotional material which is used to market superstations. Typical of the statements made are the following extracts from superstation promotional material:

"Nothing Sells Cable Like WGN Sports."

"Recent research studies conducted all over the U.S. prove that WTBS has the highest national viewership of any basic service. Why? One reason is no other general entertainment network in America has more sports programming than WTBS, The Super Station. On an average day, we present a minimum of 1.5 hours of sports."

"But it's obvious our programming makes WOR the superstation your subscribers want because we have more movies, more sports, and less reruns."

"A very appetizing programming menu, filled with movies and sports, is why WOR-TV turns America on 24 hours a day."

"Your subscribers, present and future, are going to love you for including WOR in your programming schedule. . . . For two reasons: movies and sports. WOR is heavy on both and statistics show they're the two primary reasons television viewers subscribe to cable TV."

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[14] H.R. Rep. No. 87-1178, 87th Cong., 1st Sess. 3 (1961); S. Rep. No. 87-1087, 87th Cong., 1st Sess. 2 (1961).

"We're mostly sports and movies, because that's what you want for your subscribers."

"Although movies and sports are mainstays of [WTBS'] programming, Channel 17 has built a solid record with other types of programming as well."

It is hardly surprising, therefore, that cable systems have consistently selected professional sports flagship stations as their distant signal offerings. Only 58 of the over 700 U.S. television stations are professional sports flagship stations. Yet, by the end of 1980 (the most recent year for which such statistics are available) over 90 percent of the large cable systems (those with more than $160,000 in semi-annual gross receipts) imported one or more of these 58 stations.

Nevertheless, the Government-prescribed royalty fees which cable systems pay to retransmit distant signal sports programming bear no resemblance whatsoever to the marketplace value of this programming. Indeed, in 1979 (the most recent years for which the Copyright Royalty Tribunal has allocated royalties) some 4,000 cable systems paid approximately $15.8 million in royalties for their distant signal programming.[15] The Copyright Royalty Tribunal allocated only 15 percent of this pool for all professional and collegiate sports telecasts. What this means is that an average cable system importing some 200 live sports telecasts would have paid in 1979 less than $3 for each of these telecasts.[16]

The huge subsidy that sports interests and other copyright owners provide the cable industry was documented in a recent proceeding before the Copyright Royalty Tribunal. After evaluating an extensive amount of evidence submitted by the sports clubs, other copyright owners and the cable industry itself, the Tribunal concluded that the "current statutory rates could not be considered those that would result from full marketplace conditions if the compulsory license did not exist." [17] The Tribunal found that, in a free marketplace, a cable system would be required to pay 3.75 percent of its basic receipts for each "distant signal equivalent" that it imports—or between 5 and 16 times what the largest cable systems would pay for the same programing under the statutory rates (as adjusted by the Tribunal for inflation) and upwards of 100 times what the smallest systems would pay.[18]

In short, compulsory licensing not only deprives the sports clubs of all control over their product in a way which jeopardizes the ability of the clubs to function successfully. Compulsory licensing also requires the clubs to give their product away for a pittance which has no relationship to its true marketplace value to cable. The lack of adequate compensation serves to underscore the gross inequity of the current situation and further prompts the need for corrective action.

B. There is absolutely no justification today for compulsory licensing of professional sports programming

During his testimony before the Senate Judiciary Committee, the Register of Copyrights came to the unqualified conclusion that compulsory licensing of distant, non-network programming should be eliminated, explaining: "A compulsory license mechanism is in derogation of the rights of authors and copyright owners. It should be utilized only if compelling reasons support its existence. Those reasons may have existed in 1976. They no longer do."[19]

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[15] *See* Statement of Register of Copyrights before the House Subcomm. on Courts, Civil Liberties and the Administration of Justice, 97th Cong., 1st Sess. 17 (July 15, 1981).

[16] The average cable system paid $3,950 ($15,800,000 divided by 4,000) for all of its distant signal programming. The sports' share of the $3,950 amounts to $593 (15 percent of $3,950). If a system imports 200 sports telecasts, the average price per telecast is $2.97 ($593 divided by 200.) The average cable system, which in 1979 imported 5 distant signals, would likely have imported more than 200 sports telecasts, thereby making the price per telecast even lower: indeed, any one of the satellite-delivered superstations typically presents about 200 sports telecasts each year.

[17] CRT, Adjustments of the Royalty Rates for Cable Systems; FCC's Deregulation of the Cable Industry, 47 Fed. Reg. 52146, 52154 (1982).

[18] Under the provisions of the Copyright Revision Act, the Tribunal was able to set the 3.75 percent rate only with respect to those distant signals which cable operators could not import under the former FCC rules. In addition, because of statutory restrictions upon the Tribunal's authority, the 3.75 percent rate applies to less than one-quarter of all cable systems in the United States; it does not apply to any system located outside of all television markets or any system with less than $240,000 in semi-annual basic receipts.

It should be noted that the Tribunal also adjusted the rates applicable to certain distant signals which cable operators could import under the former FCC rules. Because of statutory restrictions on its authority, the Tribunal was not able to set complete marketplace rules with respects to these signals—although it did increase the inflation-adjusted statutory rates by between 50 and 100 percent. These rules apply only to the larger cable systems located in the top 100 television markets, and only to those distant signals which had previously been subject to the FCC's syndicated exclusivity rules.

The Register's remarks, which are supported by the Chairman of the FCC and the Commerce and Justice Departments, are particularly appropriate when one considers the plight of sports.

1. *Compulsory licensing requires professional sports clubs, which typically enjoy only marginal economic success at best, to provide an enormous subsidy to the cable industry, which has become dominated by some of the nation's largest and most profitable conglomerates*

It is quite clear that compulsory licensing requires the sports interests to subsidize the cable industry—a Government-established price tag of approximately $3 per telecast per system supports no other conclusion. It is simply wrong to require professional sports to provide such an enormous subsidy to any private profit-oriented enterprise. But the absolute absurdity of it all is that the major recipients of these "contributions" are not small, struggling operations; to the contrary, they are the large, trmendously successful communications conglomerates that now dominate the cable industy, entities such as:[20]

Westinghouse, which purchased Teleprompter, for an estimated price of $646 million to become the nation's third largest multiple system operator (MSO).

Time, Inc., which in 1978 bought American Television and Communications, for $179.6 million, and which has more recently purchased Midwest Video, to become the nation's second largest MSO.

The Times-Mirror Company, which has become the nation's seventh largest MSO after purchasing Communications Properties, Inc. for $128 million.

American Express and Warner Communications, which entered into a joint venture to become the nation's sixth largest MSO.

The New York Times, which purchased a chain of cable systems in New Jersey for $119 million.

And a number of the other major corporations, including Viacom International (tenth largest MSO), General Electric (sixteenth largest), Century Insurance (twenty-ninth largest), Cox Broadcasting (fourth largest), and Storer Broadcasting (fifth largest).

The domination of the cable industry by these corporate giants is beyond question. Industry sources disclose that the 25 largest MSOs control some 61 percent of all cable subscribers in the United States; just the top 10 control 44 percent of these subscribers.[21]

It is not surprising that such prominent business concerns have rushed to take over the cable industry. According to the FCC's most recently available financial data, the cable industry had a pre-tax net income in 1980 of nearly $170 million—notwithstanding the substantial amounts that it recently has had to invest to wire the major urban markets. This $170 million figure represents a huge increase over the approximately $27 million in net income that the cable industry had in 1975, just before Congress enacted the compulsory licensing scheme.[22] Cable's financial future looks even more promising. Industry observers predict that cable's revenues will increase from $4 billion in 1981 to $28 billion in 1990.[23]

These glowing financial reports for the cable industry present a striking contrast to the situation of Major League Baseball.

In 1980, when the cable industry enjoyed a profit of some $170 million, only 8 of the 26 Major League Baseball clubs earned a pre-tax profit. Moreover, the 18 clubs that lost money in 1980 lost considerable sums: a combined total of approximately $41 million, or an average loss of over $2 million per club. Balancing the losers with the profitable teams in 1980 shows an estimated net pre-tax loss of about $26 million, a net loss figure that I believe dwarfs any prior loss sustained by Baseball.

Baseball's financial performance in 1980 is not atypical. The Cambridge Research Institute (CRI) has recently completed and published a study which reflects that Baseball lost money every year from 1974 through 1979, except in 1978 when the industry barely broke even. The performance record for the individual clubs is consistently depressing: in 1974, only 7 of 24 clubs showed an operating profit; in 1975,

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[19] Oversight of the Copyright Act of 1976 (Cable Television): Hearings before the Senate Judiciary Comm., 97th Cong., 1st Sess. 151 (1981) (Statement of David Ladd).

[20] The MSO rankings are as of August 1982 according to Cablevision Magazine, November 22, 1982, at 35.

[21] NTIA, Cable Copyright: Alternatives to the Compulsory License at 19 (December 1981).

[22] NTIA, Cable Copyright: Alternatives to the Compulsory License at 19 (December 1981).

[23] Multichannel News, April 19, 1982, at 8.

10 of 24; in 1976, 7 of 24; in 1977, 11 of 26.[24] More recent Baseball data show that the trend has continued—in 1978, 12 of 26 clubs made money on their baseball operations, and in 1979 and 1980, there were 11 and 10 clubs, respectively, that made money on their baseball operations. CRI concluded that even with respect to the most profitble clubs, there was "a relatively mediocre rate of return by most industry standards." [25]

The question must be asked: What justification can possibly exist for requiring business concerns which enjoy only marginal economic results, such as the Major League Baseball clubs, to subsidize some of the most successful of the Fortune 500 conglomerates? We submit that there is no basis, in reason or equity, to permit these corporate giants to expropriate the property of professional sports clubs pursuant to a compulsory licensing scheme. Cable is no longer a fledging, "mom and pop" industry. It should no longer be treated as such at the expense of the professional sports interests.

2. Compulsory licensing of sports programming can no longer be rationalized on the basis of heavy FCC regulation of the cable industry

Congress imposed a compulsory license system in 1976 in part to counteract heavy FCC regulation of the cable industry.[26] However, the regulatory picture, and thus one of the principal underpinnings of compulsory licensing, has changed drastically since the passage of the 1976 Act.

The FCC has eliminated virtually all of its significant cable regulation

During the several years since the Congress considered the copyright revision legislation,[27] the FCC has, for example:

Deleted its "leapfrogging rules, which prevented cable systems from importing independent television signals from any but the two closest television markets.

Exempted cable systems with less than 1,000 subscribers from essentially all regulation.

Eliminated the process by which it certified cable operations, thereby allowing cable systems to switch from one sports station to another on a seasonal, monthly and even daily basis.

Eliminated its rules setting forth minimum franchise requirements.

Expanded the categories of television signals which cable systems need not delete under the network nonduplication rules.

Eliminated virtually all restrictions on the licensing of earth stations, which are used by cable systems for the reception of television signals from satellites.

As a result of court action, deleted its rules requiring cable systems to afford the public and others access to their facilities and imposing upon cable systems minimal channel capacity requirements.

As a result of court action, deleted its rules restricting the amount of sports and other programming available to pay cable.

Most importantly, a four-to-three majority of the FCC recently voted an end to virtually the last vestigages of cable regulation—the signal carriage and syndicated exclusivity rules. From our standpoint, the most significant result of that narrow vote, which became effective on June 25, 1981, is that cable systems may expropriate as much of the sports product as they wish—subject only to the minimal, and wholly inadequate, restrictions of the Sports Rule discussed below at page 37–38. Indeed, recognizing the immense value of live sports programming, cable systems may soon attempt to "cherry pick" this programming from a variety of television stations and to offer a single channel of highly desirable sports events.

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[24] Markham & P. Teplitz, Baseball Economic and Public Policy 79 (1981).

[25] *Id.* at 82.

[26] In its report accompanying the copyright legislation, the House Judiciary Committee noted: "[Any] statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

[27] As noted, the Congress determined not to exclude professional sports programming from the compulsory licensing provisions of the 1976 Copyright Act because it considered the sports issue to involve communications policy. Resolution of the issue was committed to FCC (which at the time was in the midst of a rulemaking proceeding concerning cable's importation of sports programming) and to the Commerce Committees. See S. Rep. No. 94-473, 94th Cong., 1st Sess. 80 (1975); S. Rep. No. 93-983, 93d Cong., 2d Sess. 132 (1974). As Senator Tunney noted, if the FCC's "rules appear to reflect an improper balance between the concerns of sports and CATV, the Congress could investigate and hold full hearings for remedial legislation." S. Rep. No. 93-1035, 93d Cong., 2d Sess. 77 (1974) (Minority Views on Sen. Tunney); 120 Cong. Rec. S16155 (Sept. 9, 1974) (daily ed. remarks of Sen. Tunney). See also 120 Cong. Rec. at S16158 (daily ed. remarks of Sen. Hruska).

In proposing the elimination of the signal carriage and syndicated exclusivity rules, the FCC relied upon a number of studies that purportedly gauge the impact of this action on various parties. Significantly, the FCC studies fail even to mention, let alone discuss, the effect of eliminating these rules on professional sports. Although the leagues pointed out this glaring omission to the FCC, the FCC never undertook any separate study which attempted to assess the impact of its action on sports or the continued supply of sports programming over full television. As the Commerce Department's NTIA has concluded, "[A]nomalous and potentially harmful effects of the compulsory license on the availability of sports programming are only exacerbated by removal of the FCC's distant signal importation restrictions." [28]

As noted, the FCC's Sports Rule imposes some restrictions upon cable's importation of distant signal sports telecasts. 47 CFR § 76.67. However, as the Register of Copyrights has testified before the Congress, the Sports Rule does not adequately protect the legitimate interests of sports clubs. The rule does no more than prevent cable systems located within 35 minles of the home team's community from importing 2½ hours of the distant signal telecast of a game involving that team—provided that the home team does not televise the game locally; provided that the cable system does not have less than 1,000 subscribers; provided that the distant signal is not "grandfathered" on the system; and provided that the team complies with all of the costly notice requirements adopted by the FCC.[29]

Significantly, the Commission's refusal to provide the full measure of relief sought by the sports leagues was attributable, in large part, to the Commission's view that it does not have jurisdiction under the present communications laws to do so.[30] Therefore, it is the responsibility of Congress to rectify this situation statutorily.

(b) Notwithstanding its lip service to the concept of a free marketplace, the cable industry has successfully supported government intervention and regulation which suits its interests

At the same time that cable has waved the free marketplace banner to rid itself of FCC regulation, it has successfully sught government regulation which protects its interests. The FCC, for example, has insulated cable from the competition which would be posed by the phone company and local broadcasters by generally prohibiting their ownership of cable systems; cable has sought statutory codification of this protection as well as protection against competition from foreign-owned and municipally-owned cable systems. Local authorities have given cable operators a natural monopoly over cable services in their franchise areas, while the FCC has placed a lid on the franchise fees which these authorities may exact—a maximum which the cable industry also has sought to codify in legislation which it has urged upon the Senate Commerce Committee. And Congress, when it enacted the 1978 amendments to the Communciations Act, authorized the FCC to protect cable systems by regulating the terms and conditions (including price) which could be imposed for pole attachments. This, of course, has resulted in cable's receiving a substantial windfall in the form of significantly reduced pole attachment payments.

But the most telling example of cable's on-again, off-again support for a free marketplace can be seen in its fervent desire to retain compulsory licensing—which is the antithesis of such a marketplace. As the Register of Copyrights testified, "It is reasonable to ask . . . how 'full and fair' . . . competition can be when, among all the program distribution services, cable television is the only one that stands outside the marketplace for a portion of its product." [31]

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[28] NTIA, Cable Copyright: Alternatives to the Compulsory License at 27 (December 1981).

[29] Notwithstanding our extraordinary efforts to notify cable operations, we have repeatedly found systems who have disregarded our notices and their obligations under the Sports Rule. Given the FCC's refusal to impose any more than a minimal fine on such systems (between $250 and $750 per violation) it is difficult to secure the cooperation of cable operators.

[30] The Commission concluded: "Our responsibilities under the Communications Act to foster an efficient, non-nationwide communications service, compelled us to issue cable television signal carriage, program exclusivity and anti-siphoning rules which we have determined will adequately protect the ability of television broadcast stations to serve the public. *We can find no public interest rationale in terms of our national communications policies for affording sports programming additional protection against audience fragmentation." Report and Order in Doc. No. 19417,* 54 F.C.C.2d 265, 277 (1975) (italic added).

It should be noted that the various rules to which the Commission referred in the above passages have since been eliminated.

[31] Statement of the Register of Copyrights Before the House Subcomm. on Courts, Civil Liberties and the Admin. of Justice at 53 (July 15, 1981).

In short, we can understand, although we do not necessarily agree with, the original decision to award cable the compulsory licensing privilege in recognition of heavy FCC regulation of that industry. But we are at an absolute loss to comprehend the continued exemption of the cable industry from normal marketplace forces in light of today's virtually complete deregulation of that industry; the failure of the FCC to impose any meaningful restriction on the importation of distant signal sports programming; and the industry's successful support of regulation which protects cable. Quite simply, we do not believe Congress ever intended that cable should have it both ways.

3. Compulsory licensing of sports programming is unnecessary to insure access to sports programming

Congress adopted a compulsory license scheme believing that it would be "impractical and unduly burdensome" to require cable systems to negotiate rights fees with copyright owners.[32] Cable also argues that compulsory licensing is necessary to insure its access to distant signal programming. Whatever the merits of the arguments in 1976, they are certainly not true today with respect to sports. Cable's experience in bargaining with the sports interests during the past several years conclusively demonstrates that there is no factual basis for the major underpinning of compulsory licensing.

For example, for the fifth season in a row, Baseball has negotiated a contract with USA Network to distribute via Satellite a game-of-the-week to cable systems across the country; the National Basketball Association, National Hockey League, North American Soccer League and other professional and collegiate sports interests also have cablecast a substanital number of their events over USA Network. Another cable program packager, the Entertainment and Sports Programming Network (ESPN), has contracted with professional, collegiate and amateur sports interests. ESPN presents continuous sports programming to cable systems throughout the United States. USA Network currently reaches some 13 million cable subscribers, while ESPN reaches nearly 19 million.[33]

In addition, a number of individual professional sports clubs have successfully negotiated with cable systems:

PROFESSIONAL SPORTS CLUBS WITH CABLE CONTRACTS[34]

Club	Cable packager	Number of games
Boston Celtics	PRISM—New England	30
Buffalo Sabres	International Cable	30
Chicage Black Hawks	Sports Vision	56
Chicago Bulls	do	56
Chicago Sting	do	28
Chicago White Sox	do	112
Cincinnati Reds	QUBE (Columbus) Reds on cable	10
Cleveland Cavaliers	The Sports Exchange	50
Cleveland Indians	Ten TV	20
Dallas Mavericks	Five Star Cablevision	4
Denver Nuggets	Various	11
Hartford Whalers	PRISM—New England	38
Houston Astros	WACC Sports Channel	80
Houston Rockets	do	24
New York Islanders	Sports Channel	60
New York Knicks	MSG Network	41
New York Mets	Sports Channel	40–60
New York Rangers	MSG Network	40
New York Yankees	Sports Channel	42
New Jersey Devils	do	20
New Jersey Nets	do	40
Philadelphia Flyers	PRISM	30
Philadelphia Phillies	do	30
Philadelphia 76ers	do	25
Phoenix Suns	Arizona Sports Network	50

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[32] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

[33] Cablevision Magazine, Nov. 22, 1982, at 350.

PROFESSIONAL SPORTS CLUBS WITH CABLE CONTRACTS[34]—Continued

Club	Cable packager	Number of games
Pittsburgh Pirates	Action TV	
San Antonio Spurs	Rogers UA Sports Channel	55
Seattle SuperSonices	Sonics Super Channel	82
Texas Rangers	Five Star Cablevision	20

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[34] The baseball and NASL telecasts are those presented in the 1982 season. The NBA and NHL telecasts are those scheduled for the 1982–83 season.

In addition, more than 20 clubs have successfully negotiated arrangements with subscription television and MDS operations. They include the Los Angeles Dodgers, California Angels, Minnesota Twins, Detroit Tigers, Cincinnati Reds, Texas Rangers, Chicago White Sox, Baltimore Orioles, St. Louis Cardinals, Los Angeles Kings, Detroit Red Wings, Minnesota Northstars, Chicago Blackhawks, Los Angeles Lakers, Phoenix Suns, Dallas Mavericks, Chicago Bulls, Indiana Pacers, Denver Nuggets, Detroit Pistons, Chicago Sting, and Golden State Warriors.

There is further evidence that the cable industry has the ability to bargain in the marketplace for sports programming, without the security blanket of a compulsory license. As discussed above, the cable industry has become dominated by some of the nation's largest corporate enterprises who surely, at the very least, are the equals of the sports clubs at the bargaining table. Indeed, many of these enterprises are already bargaining for sports programming through their broadcast subsidiaries; there is no reason whatsoever that they could not bargain for the programming on their cable subsidiaries as well. As the following chart illustrates, many of the clubs' "flagship" stations are owned by corporations with significant cable interests:

PROFESSIONAL FLAGSHIP STATIONS WITH CABLE INTERESTS

Club	Station	Corporate parent of station
Pittsburgh Pirates	KDKA	Westinghouse.
San Francisco Giants	KTVU	Cox.
Boston Red Sox	WSBK	Storer.
Boston Bruins	WSBK	Do.
Los Angeles Kings	KHJ	General Tire.
Los Angeles Lakers	KHJ	Do.
New York Cosmos	WOR	Do.
New York Mets	WOR	Do.
New York Knicks	WOR	Do.
New York Islanders	WOR	Do.
New York Rangers	WOR	Do.
New Jersey Nets	WOR	Do.
Boston Celtics	WBZ	Westinghouse.
Cincinnati Reds	WLWT	Multimedia.
Hartford Whalers	WVIT	Viacom.
Detroit Pistons	WKBD	Field Communications.
Chicago White Sox	WFLD	Do.
Detroit Red Wings	WKBD	Do.
Seattle Supersonics	KIRO	Bonneville International.
Utah Jazz	KSL	Do.
Philadelphia Seventy-Sixers	WPHL	Providence Journal Broadcasting Corp.
Chicago Cubs	WGN	Tribune Co.
Chicago Sting	WGN	Do.
Chicago Bulls	WGN	Do.
Denver Nuggets	KWGN	Do.
Colorado Rockies	KWGN	Do.

Can one believe that Westinghouse, which negotiated on behalf of station WBZ with the Boston Celtics, would not be able to negotiate on behalf of its cable operations as well?

The sports leagues are in business to do business; they cannot afford to ignore obvious and valuable business opportunities. The Baseball clubs alone present nearly 1,600 broadcasts each season over conventional television, as well as a number of others over the national networks, cable and STV. As the Register of Copyrights testified before the Senate Judiciary Committee, "Cable is aggressively moving to satisfy the insatiable American appetite for sports. Its widening success belies the need for a compulsory license to supply sports programs."[35] In short, when the marketplace has been left to function, there have not been any practical barriers to dealings between cable and the sports interests.

To be sure, the sports interests have sought to protect their home territories from oversaturation. Many clubs have refused to license any over-the-air telecasts of home games; others have licensed only a minimal number of such telecasts. Significantly, the propriety of protecting the home gate was recognized by Congress in the 1961 Sports Broadcast Act. And the leagues have imposed restrictions on the USA Network Game-of-the-Week cablecasts which can be carried by cable systems in the home territories, absent consent of the home club. The local broadcasters, networks, USA Network and cable systems have nevertheless all been able to function successfully. The cable industry would be able to function just as successfully if the professional sports clubs were afforded the limited rights of control. The ultimate result would be to preserve free television as a viable medium for the presentation of professional sports telecasts.

III. CONCLUSIONS AND RECOMMENDATIONS

The controversy over cable's copyright liability does not involve only the MPAA, NAB, and NCTA. Sports is also a key party-in-interest and has been since the very beginning of this controversy nearly two decades ago. Just like the syndicators and the broadcasters, we too are seriously affected by cable's compulsory license. And the recent dramatic regulatory and technological changes—changes which have prompted Congress' revisiting of the copyright legislation—affect sports as much, if not more, than any other party. As the Register of Copyrights noted during his testimony before a House Subcommittee, "the sports entrepreneur likely faces more troublesome marketing problems than other suppliers of programming."[36]

Under these circumstances, we urge that you reject a compromise that excludes sports. We submit that a fair resolution of the controversy over compulsory licensing must extend beyond the pieces of the controversy which which H.R. 5949 seeks to deal. H.R. 5949 should not be enacted without resolving the problems created by cable's compulsory licensing of professional sports telecasts.

Chairman **Packwood**. Mr. Stern.

Mr. **Stern**. Mr. Chairman, it is not our pleasure but it is our duty on behalf of the National Basketball Association to oppose this bill. I am sure that all of your staffers and those of you who have taken the time to look at it, all of you know that it is really a piece of private interest legislation that has been carried around here as an emperor of compromise. I will submit to you that this emperor is not wearing any clothing.

The three industry groups have crafted this private deal before you. Mr. Turner was adamantly against it initially, so he was grandfathered, so that he would be in favor of the deal. The religious broadcasters who come here praising it were adamant in their opposition 3 weeks ago, and now they are talking about the degree of diplomacy that has been entered into to get this great compromise through. The NCAA has its little piece of the action, the public radio people have their piece of the action.

And then in the face of this, Mr. Wunder comes here properly reciting that every single public interest group that testified on what is in the public interest—as Mr. Chairman said earlier at the outset about this being in the public interest—in fact, everyone has said the public interest calls for the elimination of the compulsory license. That is what NTIA, that is what Justice, that is what the FCC, that is what anyone charged with anything other than a private interest has said about this legislation. Now against that background we have the three parties coming in here yelling about the wonders of this compromise.

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[35] Oversight of the Copyright Act of 1976 (Cable Television): Hearings Before the Senate Judiciary Comm., 97th Cong., 1st Sess. 132 (1981) (Statement of David Ladd).

[36] Statement of David Ladd, Register of Copyrights, before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm., 97th Cong., 1st Sess. (1981).

We submit to you that it should be rejected. The compulsory license should be eliminated in accordance with what Mr. Wunder testified to this morning. If it is not, then this little hodgepodge, this camel put together by a committee, is going to get through under the apparent skids that have been greased today where it is going to be marked up one business day after the hearing, which was only had because we were able to somehow get this bill off the floor, because the cable people had arranged to have it possibly enacted without any hearings at all, then it is going to go to Judiciary 2 days later and then it will probably go on to the floor 2 hours later.

We urge you to consider this, to consider the merits of all aspects of the bill. These committees have not been given the time to do it. And on top of all of that, the cable people have the audacity to come here and say we now want you, by the way, to just put this small amendment on. This small amendment. All it does is take a regulatory body, the Copyright Royalty Tribunal, which is acting exactly in accordance with the way this Congress told it to act back in 1976 by making a decision on the merits, which is subject to legal attack if they don't like it, but the decision didn't go their way so they are coming in here and asking you to bail them out the next business day by adopting an amendment which totally guts the functioning of an agency that has been studying this problem for years.

We really wish to disassociate ourselves from this legislation. We don't want in; we want this legislation considered on its merits, and we have confidence that when it is considered on its merits, the decision will be made that the process should begin again and something in the public interest should be fashioned, not something in the private industry interest.

Thank you for having us to present our views.

[The statement follows:]

STATEMENT OF DAVID J. STERN, EXECUTIVE VICE PRESIDENT, NATIONAL BASKETBALL ASSOCIATION

Mr. Chairman: On behalf of the National Basketball Association and its member teams, I thank you for inviting us to present our views with respect to H.R. 5949, which the NBA strongly opposes. Regrettably, the cable industry urges the adoption of this legislation in order to continue the subsidy whch cable systems now enjoy by virtue of their ability, under the compulsory license of the 1976 Copyright Act, to import distant television signals without making fair payment to the program producers whose product appears on those signals. The current posturing of the cable industry is unconscionable and an insult to the legislative concerns of these Committees. On the one hand, cable lobbyists bombard the Congress and the Federal Communications Commission with pleas to "deregulate" cable and allow it freely to "compete" in an environment shaped by "marketplace" conditions; on the other hand, using the rubric of so-called "compromise," the industry's spokesmen insist that marketplace considerations should be submerged and that sports leagues should be required to subsidize cable's program acquisition costs through continuation of the compulsory license. The subsidy which sports leagues are required to provide to the cable industry through the compulsory license is equitably and logically indefensible, for the following reasons:

First: To the extent that the compulsory license was viewed, in 1976, as necessary to aid a new and "struggling" industry, this is no longer the case. The audience shares of the three networks are declining because of the penetration of cable whose programmers now compete with networks for most products and whose reach approaches 30 million subscribers and is expected to double by 1990. The list of corporate giants that have replaced the former "Mom and Pop" ownership and that now dominate the cable industry, includes Time, Inc., Warner Communications, Westinghouse, American Express and the New York Times, to name a few.

Second: To the extent that the compulsory license was viewed, in 1976, as necessary to enhance the diversity of essentially local or regional programming to which cable subscribers might have access by microwave transmission, this rationale no longer exists. There are now over forty satellite-delivered services providing a dazzling variety of national programming to cable, and that number will increase substantially as newly announced services become operational.

Third: to the extent that the issue of the continuation of the compulsory license has been addressed by agencies or individuals vested with a "public" trust, there is unanimous agreement—cutting sharply across party lines—that the compulsory license should be eliminated in favor of a free marketplace. I respectfully refer you to the Chairman of the Federal Communications Commission; the Justice Department; the Register of Copyrights; the former and current heads of the National Telecommunications and Information Administration; and the past Chairman of the Copyright Royalty Tribunal.

The Copyright Subcommittee of the House of Representatives began its deliberations in this matter by announcing its intentions to study whether there was a justification for continung the compulsory license. It then proceeded to ignore that inquiry and to allow three industry associations—the National Cable Television Association, the National Association of Broadcasters, and the Motion Picture Association of America—to make a private deal as a substitute for the legislation initially introduced.

I can assure you that there were ample trade-offs available to those three groups, since they were carving up the communications carcass of professional sports. Thus, as long as "syndicated exclusivity" was given to the MPAA and "mandatory carriage" to the NAB, they were willing to sacrifice increased copyright fees for their programming—*and* for professional sports' programming as well. The NCTA could afford to agree to syndicated exclusivity, *so long as its members could continue importing an unlimited number of sporting events without substantial increases in copyright fees.* As the NCTA advised its membership by memorandum: "The proposed agreement in no way changes the current sports blackout rules so audience viewership should not be affected."

Once the process of horse trading began, it took on a life of its own. The *Eastern Microwave* decision, questioning the copyright liability of resale carriers, was decided one week—an amendment overruling it was introduced the next. Turner Broadcasting announced its opposition to the "compromise"—new language was inserted to protect its current programming from syndicated exclusivity. Religious broadcasters expressed their unhappiness—an exception was carved to placate them. This list of exceptions is endless, all minor "compromises" to ensure that nothing would stand in the way of legislation crafted for one purpose: to entrench the subsidy provided to the cable industry by the compulsory license. The legislation that emerged may be a tribute to the effectiveness of the cable lobby, but it should not be viewed as reflecting serious consideration of the policies underlying continuation of the compulsory license, or as merely restoring some ill-defined "status quo"—which it does not.

For all these reasons, the NBA welcomes the review of H.R. 5949 being undertaken by your two Committees. In our judgment, this piece of legislation should be replaced with one that eliminates the compulsory license in its entirety—albeit by a "sunset" provision of appropriate duration, with whatever exceptions might be necessary for particular cable systems or geographic areas, if any, that qualify for the considerations which led originally to the enactment of the compulsory license. This is the only course of action that is endorsed by all relevant governmental agencies as being in the public interest and is totally consistent with the deregulation being sought in other areas by the cable industry.

If the cable industry is so strong that the compulsory license cannot, as a political matter, be eliminated, the best suggestion that the NBA can make is that the "syndicated exclusivity" provisions of the legislation be applicable to all program suppliers—including sports. Thus, in any market in which NBA games are televised locally, cable systems would be precluded from importing distant signals that carry NBA games. There appears to be no public policy which would justify a situation in which the hundreds of episodes of "I Love Lucy" are entitled to complete exclusivity protection, but NBA games regularly broadcast in a particular market are entitled to no such protection.

A third potential suggestion for dealing with this situation, in the absence of either the elimination of the license or the grant of "syndicated exclusivity" to sports broadcasts, is the model utilized by the NBA in its contracts with the USA Cable Network and Entertainment and Sports Programming Network. Under these contracts, the cable networks are required to "black out" the game being cablecast in any NBA market whose team is either playing at home or playing away and televising its game back to the home market. Although this protection is obviously not as broad as that which would be provided by elimination of the license or the grant of syndicated exclusivity, it does address the issues of protection of the home gate and protection of the local telecast, both of which are revenue sources of vital important to all NBA teams.

Thank you for permitting me the opportunity to provide the NBA's position.

Chairman PACKWOOD. Mr. Ehrhart.

Mr. EHRHART. Thank you, Mr. Chairman. Thank you for inviting the U.S. Football League to testify here today. I think we are a little bit different in that we are the new kid on the block, and I am joining my associates here and I would like to explain just a little bit.

Senator Long, we are certainly not monopolists, because we are just now getting underway. When the Washington Federals kick off at RFK on March 6, we are trying to break in, we are trying to jump into a situation and create a successful league. We are going to open up with 12 franchises, ranging from Boston, New York, down to Tampa, Philadelphia, Birmingham, Chicago, Detroit, Denver, Phoenix, Oakland and Los Angeles, and what we need is a full range of integrated support.

We are a little bit different here because we are the first league in its initial year that has ever signed a contract with a major cable network. We have recently entered into an agreement with ESPN, and certainly we are not here to weaken the cable industry. But the success of our league will be based on two primary revenue sources, the fan attendance through the live home gate and a strong overall television exposure.

We are also dealing with ABC and we will be integrating a national game of the week with ABC. And with this we will be integrating our games of the week with ESPN over the cable network, so obviously cable television is a key ingredient in our comprehensive television package. But any erosion of either of those two revenue sources will severely hinder the ability of the USFL to operate and profit.

Certainly we need to be able to freely bargain and control our product. There are a lot of guys that are at risk out there right now who are taking a hell of a gamble to break in and create a new football league.

I talked with Mr. Stern about an example that would be very difficult for us, if our people down in Birmingham are working like mad to get fans in the stadium down at Legion Field and to improve that economy down there, and the Chicago Blitz, our team in Chicago, if they are particularly strong and on a roll, and Birmingham says you can bring in their distant signal in opposition to a game that the Birmingham Stallions are playing.

So I think there are some ways of addressing these issues and I think it is a matter of, as Mr. Stern says, sitting down and working out and analyzing all the various scenarios. Senator Kasten had a good point there. There are many ways of going after this and designing the type of legislation that would be in the public interest.

Certainly we want support. We want exposure. We are not trying to limit the number of games of the USFL that will be broadcast by any network around the country. We obviously want that, but we have to be able to work with those broadcasters and those networks where they are putting it on so that we can survive.

Thank you.

[The statement follows:]

STATEMENT OF STEVEN E. EHRHART, COUNSEL TO THE COMMISSIONER AND DIRECTOR OF ADMINISTRATION, U.S. FOOTBALL LEAGUE

Mr. Chairman: On behalf of the United States Football League and its member clubs, I thank you for inviting us to present the views of the USFL with respect to H.R. 5949. This legislation, said to be a compromise agreement fashioned principally among three industry groups, the Motion Picture Association of America, the National Association of Broadcasters, and the National Cable Television Association, perpetuates a regulatory scheme that could seriously damage the ability of professional sports to operate successfully and profitably.

It is ironic that in the opening statement by Congressman Wirth, Chairman of the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee of Energy and Commerce, at a prior hearing to consider this subject, he commended these groups for developing legislation which provides a "level playing ground". The use of such sports terminology symbolizes the dependency these three groups have on the popularity of professional sports. Indeed, their success in drafting such an agreement is based in many respects on the success of professional sports programming. It is thus unfortunate that this "leveling" could only occur once the interests of professional sports were bulldozed under the surface.

In 1976, Congress deemed it appropriate and necessary for the development of the cable industry to establish the compulsory license mechanism. However, by 1982, particularly in light of the deregulatory measures enacted by the Federal Communications Commission in the interim, there is simply no reason why a highly profitable cable industry should not bear the obligations of negotiating in a free market place for the rights to telecast distant signal professional sports programming.

Mr. Chairman, it is quite clear that compulsory licensing requires professional sports to subsidize the enormous cable industry. In 1976, it was thought wise to do so due to the fact that the cable industry was seen as a small struggling operation. However, today this industry has become dominated by such telecommunication conglomerates as Westinghouse, Time, Inc., American Express, Warner Communications, and Cox Broadcasting. In an era when many professional sports teams are existing on a marginally profitable level, the logic of continuing this subsidy becomes even more flawed.

Although all of professional sports is affected by this legislation, the United States Football League will be placed in an extremely precarious position if H.R. 5949 is enacted. As I am sure you are aware, Mr. Chairman, the USFL is in its infancy. As the cable industry needed protection in 1976 so it could prosper, so also does this League need an atmosphere conducive to a healthy development. The USFL recognizes that its success will be largely predicated on a strong cable industry. Indeed, it is the only professional sports league to have negotiated a major televsion contract with a cable network during its initial year of operation. Recently, the USFL and the Entertainment and Sports Programming Network, ESPN, entered into a two-year agreement for the telecasting of USFL games. Thus, it is evident that the USFL is not before these Committees to weaken the cable industry.

The success of the USFL will be based on two primary revenue sources: fan attendance through live home gate and strong, over-all television exposure. Cable television is one key ingredient in a comprehensive television package. But any erosion of either of these two revenue sources will severely hinder the ability of the USFL to operate and profit.

This compromise legislation proves the perfect vehicle to allow such erosion. H.R. 5949 is harmful to the USFL in many significant aspects. First, permitting cable systems to import distant signals into areas in which a USFL team is playing a home game can quickly diminish home game attendance. This threatens a team's ability to raise important revenues through the home gate. It also erodes the base of local fan support. As the Register of Copyrights explained, "Cable importation of league sporting events, broadcasts or distant signals may undercut the home gate, the value of broadcast rights, and fan loyalty of another member club located in the same area of the cable system. The [Copyright] office has concluded that adequate protection should be afforded to sports leagues to minimize this potential damage." [1] The USFL has the additional difficulty of presenting a new product to the fan. As a new football league, we must create and promote local fan support from the ground level. This process becomes even more troublesome if a home team has to compete against a cable system importing distant signal telecasts of other, possibly more attractive, league members.

A second harmful aspect of distant signal importations of other USFL games is the effect any secondary transmission has upon actual or potential local television revenues. The USFL and its member clubs, at this time, are not largely dependent on raising revenues from television contracts with independent stations. However, independent stations will provide some coverage of USFL games and in the future it is anticipated that such coverage could be a significant source of income. John A. Ziegler, President of the National Hockey League, correctly elucidated on the problems unregulated distant signal importation cause. "The value of a local television [hockey] package is sustantially reduced by the ability of a cable system to import other games in direct competition with the local package at a fraction of the cost the local broadaster pays. If [an NHL] club is unable to deliver an exclusive television right to [hockey] games in an area, then the value of any package is diminished. This devalues the importance of the local television package not only from a revenue standpoint, but also from the standpoint of promoting the home club itself." [2] Thus, any attempt by the USFL or its member clubs to enter into such arrangements with independent television stations is unjustly hampered by cable's easy and inexpensive access to distant signal importations.

Compulsory licensing also unfairly deprives professional sports teams of the inherent right to receive the true value for the telecasts of their games by cable. This is exemplified by the USFL's contract with ESPN. ESPN paid marketplace value for the right to broadcast the League games. The League could never realize the true value of its programming through a compulsory licensing plan. Under such a plan, the USFL would receive fees copyright payments which are a mere percentage of what it would obtain if it could negotiate for the broadcasting rights. Thus, for the USFL, as a fledgling industry, the potential and actual harm will be staggering. The League would lose the right to control its own products losing important revenues on account of the inadequate compensation being paid retransmissions of its games. To combat both these harms, the USFL would be faced with the same options now confronting the National Basketball Association. In order to protect its product and curtail the "piracy" of distant signal importation, the USFL would cease or decline to enter into arrrangements with local stations whose signals can be picked up by cable systems. Thus, not only would important revenues be lost, but fans in every USFL city would be deprived of the right to view their team on over-the-air telecasts.

I urge this Committee to carefully examine the grave ramifications this legislation will have on the USFL and all of professional sports. We will be losing the inherent right to control the product we have created. Furthermore, we will subsidize an industry fully able to deal with the consequences of a free marketplace. In lieu of this bill, this Committee should consider legislation which requires that the originating producer give full consent prior to any program transmission. It is only through this mechanism—the free marketplace—that professional sports will be able to retain control over its own product and receive true value upon disemination and transmission of that product.

If, however, this Committee deems it wise and appropriate to continue the system of compulsory licensing, the USFL would adamantly urge that this Subcommittee apply the "syndicated exclusivity" provisions of this bill to all programming, including professional sports. Thus, in any market in which a USFL team plays and televises its games, the telecasts of other USFL games on distant signal importation should be prohibited. This measure would at least protect against the dimunition of fan attendance and allow the USFL to participate in a free and open marketplace to compete for those television revenues which will be the very barometer of success for the United States Football League.

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[1] Statement of the Register of Copyrights before House Subcommittee on Courts, Civil Liberties, and the Administration of Justice (July 15, 1981).

[2] Statement by John A. Ziegler, President, National Hockey League, before Senate Subcommittee on Communications (April 28, 1982).

Thank you.

Chairman **Packwood**. Mr. Kuhn and Mr. Stein, let me ask you this. I am not quite sure I understand. Is your objection that you are not treated the same as the others, where they have what you would call—they call it specific exclusivity and you would call it generic if you can have an exclusive on 200 serials of "MASH" rather one program? Is that what you want, the same as they are treated, or is what you want not to have competing sports products broadcast, at least during the time that you are playing your games in your community?

Mr. **Stein**. As far as hockey is concerned, Mr. Chairman, either one would be helpful to us. When we expressed concern about the rate being paid for our product, we are saying if you are going to take our product and we have no choice as to your taking it, then we want to be paid the marketplace value or we want you to negotiate with us to get it.

Chairman **Packwood**. If you would explain to me what you mean. You are not subject to copyright, as I understand it. Is that right?

Mr. **Stein**. Absolutely we are.

Chairman **Packwood**. Then explain to me what the problem is. I am not following what you are telling me.

Mr. **Stein**. All right. We broadcast. We own the copyright to a game that we are broadcasting. We broadcast the game. Any cable system anywhere in the country can take that off the air, and we get paid out of that a small portion of what they are paying into the Copyright Tribunal.

Chairman **Packwood**. All right. The Copyright Tribunal in that sense treats you the same as they treat other copyright properties. You can argue about the value they give you, but they treat you the same in their process.

Mr. **Stein**. That is true, and that is why we are against the Copyright Royalty Tribunal, and we agree that the compulsory license ought to be done away with.

Now on the other point you are talking about, why aren't we treated the same as the broadcasters of entertainment programs or of syndicated programs, just the way we are broadcasters of sports programs, we would like to be treated that way. We would like them to say if Philadelphia is visiting Chicago and their broadcast is being shown in Philadelphia on that particular occasion a Philadelphia game is being broadcast, then that Philadelphia game coming off the Chicago over-the-air signal could be imported anywhere in the United States but not in Philadelphia. Other hockey broadcasts should be able to be imported anywhere but not in Philadelphia in competition with the game that they are putting on for their home market.

That is exactly the same——

Chairman **Packwood**. That is what you want to achieve?

Mr. **Stein**. We are saying if there is going to be syndicated exclusivity protection for the broadcasters, then recognize us as broadcasters also.

Chairman Packwood. The Philadelphia hockey team is playing a home game. You don't want any other hockey games broadcast there in competition.

Mr. Stein. Well, no, that is the first step of it, and what you pointed out before is absolutely correct. The Philadelphia team could not stop the owner of another hockey broadcast from selling its rights to someone to be broadcast in Philadelphia, and I agree with you. But what that would create and the effect of that would be that each one of the member clubs would then be able to get the proper value for their broadcast.

So that, yes, I couldn't stop another team from broadcasting in my area, but my games, which will now be taken elsewhere, I will get real value for them, real marketplace value, and all of it will balance out. And the harm that I am suffering locally will be made up for, will be compensated for in part, if not in whole, by the additional revenue I can get from other areas that want my broadcast.

Chairman Packwood. Assuming anyone wants to carry the Philadelphia games.

Mr. Stein. Right. And if they don't want to, that is fine. We don't want to force it.

Chairman Packwood. But at the moment they are carried, and the Copyright Tribunal decides how much you will be paid for them?

Mr. Stein. That is right. What we got for the 1978 games, the National Hockey League games that were shown on cable throughout this country back in 1978, was about $690 a game. What we got for the games in 1979, hockey games that were shown throughout the country, was about $700 a game, and in the marketplace for national distribution, based upon experience of contract that we have now, we get $75,000 a game. Do you think that is a fair use——

Chairman Packwood. So your argument is with the Copyright Tribunal, for one. You say they are not valuing your property properly.

Mr. Stern. If I may, Senator, the copyright fee is fixed by the statute with respect to the payments to be made by cable systems that import distant signals. In 1976 by the legislation, Congress decided that the cable industry, because of its current size and technology and whatever, should be subsidized by requiring sports owners to give over their programs at a very low fee. So our argument is not with the Tribunal at that point; our argument is with the compulsory license.

Chairman Packwood. Mr. Kuhn, go ahead.

Mr. Kuhn. Mr. Chairman, I just want to add something to what Mr. Stein said. We are really not on an equal footing with the other copyright owners, and I mean the motion picture people and the other synicated program people, in this sense. You put on a hockey game or a baseball game, and that game is over and gone, it has no real vitality after that. Occasionally a little bit, but basically none, whereas a movie or "MASH" or "All in the Family" can be shown time and time again over a period of years and has great value.

Now obviously, as between those two interests, the interest that should be given the greatest protection in terms of syndicated exclusivity should be the sports interest because we only have one opportunity to try to get a fair market value for our product. And if that is competed with unfairly by a host of competing telecasts coming into our markets, we lose out on the one opportunity we have, whereas the others can constantly, year after year, capitalize on their programs.

Chairman PACKWOOD. Senator Long.

Senator LONG. Mr. Kuhn, I don't see anyone speaking for the National Football League here. Could you tell me, does anyone here know what their position is about this legislation?

Mr. KUHN. I believe in general, Senator, they would support the position taken by the other sports; however, because they are completely on network, they are not faced with the same problems that we are because of the protection of network programs. So they don't have the immediate interest that we do, but they have always supported the position that we have taken in opposition to H.R. 5949.

Senator LONG. You think they would support your position?

Mr. KUHN. I believe they would, yes.

Senator LONG. Now, I don't know whether I am for the bill at all. I just don't understand it that well. But I must say that if we are going to have a bill, I appreciate your position. I mean usually it is a matter of survival around this place to be against any combine that you are not in on, and it is these other people who are going to come up here and ask for this bill. I think that you have come with good grace to say hold on just a minute, if you people want what is in this bill, we want to be included along with the rest of them.

It stands to reason also, I assume, that if you let the bill go through, the other people get what they were looking after. After all, there are all these big interests, and if you don't get your situation taken care of, you may have to wait a very long time in order to get the same consideration that the other fellow is asking for here.

So basically your position is that if we are going to do this for the other guy, we ought to include sports in it. And as I understand your position, the reason that the National Football League is not up here asking for the same consideration is that they have a contract with the networks where they are getting their product to the viewing public in a somewhat different fashion.

Mr. KUHN. Yes. Senator, I would certainly subscribe to what you said. You put it very well.

Chairman PACKWOOD. Senator Exon.

Senator EXON. Thank you, Mr. Chairman.

Let me see if I can clarify for the record and for the panel how I view this. It seems to me that the obligation that we have, Mr. Chairman, is not to enact legislation that carries any threat to the rights of the consumers and the viewing public. That is true, on one hand. But certainly on the other hand, we don't want to do anything that grants unfair monopoly to any group, either broadcasters or sports interests, because I think that is not in the interest of the viewing public.

We have to take a little longer view, it seems to me, of this as to what is going to happen on down the line, because if we are to enact legislation, it must be as fair as possible to the competing interests, with the public's interest first and foremost. Now, what is that interest? That is what I am trying to get at.

As I said earlier, if the quality of the programs eventually suffers, then not only are the competing interests testifying here harmed, as the producers or the originators of any kind of a sporting event, for example, but more so and more importantly in the long run, the public is harmed.

I cite again and ask this panel the question that I raised that went unanswered from the previous panel. Are we likely to see deterioration if this bill is passed as is of other sporting events as we have seen with the boxing events, which seemingly have become more of a television promotion, like wrestling, than a real, legitimate public interest sporting event? You are not in the boxing business, but that is a concern of mine.

Is it a legitimate one?

Mr. Kuhn. Senator, may I?

Senator Exon. Certainly. Anyone who wants to comment.

Mr. Kuhn. I am very concerned that, faced with the problems we would be faced with, there is a danger to all these sports of deterioration. We are in a perilous financial condition today. If there is nothing done to protect us from the flood of cable sports events coming into our markets, then I think you can expect to see a deterioration in what we are able to do in presenting our product.

To take that a step farther, Senator, obviously at some point you have to look to self-help to try to protect yourself from what you can get no other protection for. For instance, we carry 1,600 telecasts a year over the air of our games apart from national television. This is local television. That is a tremendous amount of service to the public. Obviously, it is from those games that cable is picking up and carrying our signals around the country.

Senator Exon. Excuse me. Are they paying for that at all?

Mr. Kuhn. Only what the Copyright Royalty Tribunal permits, which we think has been up to now certainly grossly inadequate. Now, if we are faced with no protection whatsoever, obviously little by little and then maybe rapidly we are going to see all of these sports entrepreneurs forced to take their programs off over-the-air television and to go with controlled broadcast mechanisms such as pay and subscription, where at least they know it is not going to be picked up by cable and carried around the country, and where they can get their money's worth.

You see, they won't get their money's worth trying to sell the over-the-air after a while, and I don't think they are today, because with the proliferation of our own sport coming in against us, we can't sell an exclusive. We can't even sell an exclusive, incidentally, on our own game if we are going to telecast it ourselves in our own market. Cable can bring that game in against us, too.

So what you are going to do is at some rate or another you are going to drive sports off of over-the-air television and to pay and subscription television. Now, what we are trying to do today, Senator, is stay on over-the-air and also develop supplementary packages of subscription and pay, and I think this very legitimately meets the needs of the public.

Senator **Exon**. Mr. Commissioner, if it is not classified information, can you say for the record how many of the professional baseball teams, from your knowledge, made money last year?

Mr. **Kuhn**. Senator, I can give you figures for the last full year for which I have data. That is 1980. Eight out of twenty-six made money in 1980. In 1981 we had the strike and the situation, I believe, was worse, although it is hard to say how much was attributable to the strike and how much was attributable to other factors. But it is going to be at least as bad, and I believe—and this is now very sketchy and I can only give you my best judgment—that 1982 will be worse, in a year when we set record attendance.

Mr. **Stern**. Senator, with respect to the National Basketball Association, of our 23 teams, no more than 7 made money this past year. Our total industry's gross is somewhere between $120 million and $130 million, on which we probably lost collectively between $20 million and $30 million. Nevertheless, we are in a position where by the compulsory license, we are required to subsidize the Westinghouses and General Electrics and Warner Communications of this world who are not required to pay for our product.

Senator **Exon**. No further questions at this time.

Chairman **Packwood**. Senator Kasten.

Senator **Kasten**. Thank you, Mr. Chairman.

Mr. Kuhn, Mr. Wheeler, from the National Cable TV people, said that sports interests are seeking excessive terms. In response to my question, essentially I think he said that you are seeking something, you are asking for more protection and that you already have more exclusivity, more whatever than any of the other groups, and that is the reason why they have not been able to reach some kind of a compromise with you, that your demands are excessive.

Could you respond to that question, that characterization? And maybe some other panel members would want to as well.

Mr. **Kuhn**. Yes, Senator. I just think that Mr. Wheeler is a nice man, but that answer that he gave you is utter humbug. We have almost no protection today. The bill sets us back a long way.

What we are asking for is the right to be able to negotiate with cable in selling our product. The track record is pretty darn good, and all of these businesses represented here today are more than ready to deal with cable.

The notion that we would shut them out and preclude them from telecasting our games is more nonsense. We are dealing with USA networks, selling cable across the country. Incidentally, we do it with some blackouts and they seem to do very well with it. So it is not a problem. Blackouts are not per se a problem.

We are willing to deal with cable on the basis of our local clubs who sell to proprietary interests locally and have cable packages. Indeed, we are prepared even to bring other games into our marketplace. That is, if the White Sox are going to create a sports cable network, a pay network, and they want to bring in some other games of other clubs to fill out the package, we are prepared to do that. And plans are underway for that sort of thing to happen.

So we are not afraid to let our own games come into our own cities as long as we have some control over how it works and can generate a fair profit in selling our product to buyers.

Mr. STERN. Senator Kasten, there is a reason why the cable industry cannot under its own rationale make a deal with us, wholly apart from the fact that they do not want to, because they feel they have the political clout to go without us. For their compromise with the other two industries, it was essential that they have the copyright carcass of sports to divvy up.

For example, the NCTA said to its membership, "We can live with the syndicated exclusivity; we will give that up to the MPAA because we still have sports, and sports will keep your channel viewing high. And while we are blacking out, what do you think we will substitute for the blacked out syndicated exclusivity? We will bring in some more sports." And as long as we get unlimited signal importation, says the NCTA, as part of our deal, we will bring in as much sports as we need.

So it became very convenient to carve it up, but if sports was going to be fairly dealt with, it could not be done, according to the NCTA because they needed us. They needed the chips that we represented to pass around the table among the other three parties to the compromise.

Senator KASTEN. Mr. Ehrhart, do you want to comment?

Mr. EHRHART. I just would like to say—and obviously I cannot say that we have been purposely cut out because we have been only in existence for such a short period of time—but we have never had the opportunity in any way to discuss any of these items with the previous panel and those representatives. We certainly would like an opportunity in whatever short timeframe or long timeframe to be involved in those conversations.

And I think that some of the points you had made, we certainly can discuss with them and maneuver some of these things. A lot of these things can be controlled, I think, to some degree by, at least in our case, league scheduling and being able to be involved with which franchises are able to compete in their own marketplace.

Senator KASTEN. Mr. Kuhn, if you could further develop the difference between baseball, let's say, the Brewers and a program like MASH. It seems to me that the cable people, in particular, were just assuming that they were both the same, and I think there are some important differences.

Mr. KUHN. Well, there are some important differences. The point I was making a while ago to the chairman is one, Senator Kasten, and that is that MASH, a great program, you can watch year after year after year and it has got continuing high value. Do not try to watch the Brewers game from last August a second time. Do not look for it, because you will not find it on the air. I am sorry to say it has no value. And the same would be true of all other sports, for all practical purposes.

So they have enormous opportunity that we do not, thereby creating a rich irony because we get no protection and they get extraordinary protection of syndicated exclusivity. And in addition, they suggest that the specific and the generic do not match up here, that we try to protect all baseball. And yes, indeed, we do in the sense that we want to at least be able to deal with cable.

That does not mean we will not sell to them because we have a good record of selling to them, and we will sell to them. But we want to protect all baseball, and they said, well, they only want to protect MASH, that they want to protect all of MASH, dozens and dozens of episodes of MASH, and maybe 300 movies they want to protect in a given situation.

And all of the episodes, all of these are to be protected. And we think our situation is at least comparable and that we are more deserving of consideration than those who have found their way into this bill.

Mr. **STERN**. Senator, on the MASH point, as we understand syndicated exclusivity, if MASH is being shown in the Milwaukee market, thus being syndicated, a regular matter, whatever time of day the regular syndication is, all other several hundred episodes of MASH, whenever they might be shown at whatever timespan or whatever, are uniformly blacked out and deleted from the distant signal that is being imported into the market.

Whereas, when we enter into a deal with the USA network or ESPN where the NBA sells over 100 games for cable delivery across this country as a matter of contract, the blackout, the exclusivity that we seek, is if the home team is playing at home or playing on the road and televising back, we have a really limited time exclusivity, which I think is really what the sports people, one component of what the sports people have talked about as a way of dealing with it.

That is far less than the scope of the syndicated exclusivity that is being given to the motion picture association for every single run of a MASH or "I Love Lucy," no matter whether it is the same or a different episode, no matter whether it is at 3 in the morning or 10 at night.

Chairman **PACKWOOD**. Senator Pressler.

Senator **PRESSLER**. I shall be very brief since most of my questions are reserved for panel 3.

But I would like to ask a basic question that has been asked here this morning. That is, the public interest in this thing, the person who does not have a direct financial interest or knowledge. For example, my home State of South Dakota has no professional sports franchises at all in the entire State. However, we have great interest. Why should the people in my State be interested in a blackout provision for your organizations?

Now, there are two ways of arguing it. One way, you say, well, the teams are going to be more viable and so forth. But to the man on the street, the level of salaries and the level of expenses and so forth that are floating around, that sounds hard to believe. On the other hand, the more sports on TV, the bigger the box office, which seems to be more in the public interest.

But coming from the State of South Dakota, I can perhaps be more independent in judging this. But I just find it hard to explain to the people of my State why we should be interested in a blackout provision and so forth. How would you respond to that?

Mr. **KUHN**. Senator, we are not interested in a blackout. I am afraid the word "blackout" is one of those words that creeps into the language oftentimes that is misleading. We are telecasting widely in South Dakota at the present time. We have a network contract with USA. Cable is widely carried. Two games a week of baseball go into South Dakota.

Similarly, the basketball and hockey leagues have two cable networks going into South Dakota carrying their games. So there is a lot of baseball, football, hockey, and I am sure the U.S. Football League will be coming in there with ESPN as well. You are going to get a lot coming in there.

And in addition, what we are looking for is protection of our home territories. Certainly, taking the position of baseball, which I think is generally shared, we are not looking to foreclose the carriage of cable in your State.

I think we should be entitled to deal with cable and try to make a fair marketplace deal with them. Or if we are forced to, obviously we will live with what the CRT does. But we are not looking to foreclose cable in your State any more than we are looking to foreclose cable in Nebraska, Senator Exon's State. And I thought he got some very misleading answers from the prior panel about how all of a sudden we are going to see sports disappear from Nebraska. That simply is not true.

Mr. STEIN. I would just like to add to that that what I heard before, and I agree with Mr. Kuhn, the deletion aspect of syndicated exclusivity, which is analogous to what we are seeking, you do not delete from the broadcast. Mr. Turner and others said, well, we just will not put it on our broadcasts if we are going to have to black it out. Well, they do not have to black it out any more than they have to black out "MASH" or any of those other programs.

The syndicated exclusivity protection comes from the receiving station. The system that is getting it has to delete that program.

So as far as what is going up under the satellite, it is going to be the same thing going up under the satellite. And if our syndicated exclusivity protection is to protect our home areas, nothing that we would seek to delete in the home area would affect what would go into South Dakota and the many, many other such areas in the United States.

Mr. STERN. As a broader answer, perhaps you bring objectivity to it because you do not have a sports team. The broader answer is that this is really just a private deal here that the Congress is being asked to endorse. And the public interest calls for the elimination of the compulsory license and allowed to get this layer and layer and layer of regulation out of this. That is what every public interest group that has had occasion to study and testify has said in the past.

Mr. STEIN. One last point regarding this panic statement that we heard before from Mr. Wheeler about everything is going to go black in January because of the CRT decision. This is the publication, and I am informed, is the most knowledgable publication for the cable industry, Cable Vision, and they assess the reaction of the cable operators to the CRT. This is the latest edition, December 6, 1982. And they were analyzing it and contacting people, and this statement appears: "Cable systems that glibly announce they would just drop distant signals if copyright rates increased, now are hedging. Dropping the distant signal is hard to do." And they go on and on explaining why.

So I suggest to you, do not be panicked and do not be stampeded by Mr. Wheeler and his effort to say, oh, this terrible calamity is going to befall everybody if you do not do something to overturn what the agency has done at the CRT level in revising the rates.

Senator **Pressler**. Mr. Chairman, my other questions I am going to ask for the record, in view of the fact that there are two more panels, and truckers coming in here at 1 o'clock, some from South Dakota, or is it 1:30?

Chairman **Packwood**. 1:30; but I think we will be here up to very close to it when they come.

One of you answered, and I cannot remember which, that the National Football League did not have quite the same problem because they contracted with the networks. Explain why?

Mr. **Stern**. The National Football League has all of its games on at the same time, so that they are all carried on networks. They are not subject to—and it is basically a Sunday afternoon package.

Chairman **Packwood**. They have one on Monday night. They are not all at the same time.

Mr. **Stern**. Yes; but since they are all, most of their games as a general rule are played on a Sunday afternoon, there are no distant independent signals. They are all network feeds that are being done, that are being carried.

Chairman **Packwood**. Cable does not carry it?

Mr. **Stern**. As a matter of fact, what is happening to the National Football League—and I hesitate to speak for them—is in fact that the cable system may bring in a competing game on that same afternoon from a distant market from another network signal possibly, bring it in. And I know that the National Football League has expressed objection to that.

But the overall concern is quite different, because they only play 16 games a year, whereas baseball is 180 and basketball is 82. And as a result—I am sorry, it is 160 in baseball—but as a result we have a much more difficult time in both selling local telecast, selling local cable and attracting people at the gate, whereas football, having this limited number of home games, 8 in all, and not having a local television package to concern itself with nor local cable because of the magnitude of the network package, does not have the same kinds of concerns that are presented.

Chairman **Packwood**. Why could you not move toward the same kind of package that they have?

Mr. **Stern**. By and large, because of the proliferation of distant signals that have gone on in the past. The NBA, as a network attraction, has become less valuable because if you can see games in a given market on 7 nights of the week because they are coming in from all over, it is very difficult to go to a network to convince them that the product that you can deliver on Sunday afternoon really has something very special. It has been cannabalized by the distant signal importation.

Chairman **Packwood**. What you are saying is that you play so many games that your product has been diminished in value.

Mr. **Stern**. No; I have not said that. The distant signals diminish it in value. The difficulty of teams—and to go to a network package, you can go to a network package. If you have 8 Sundays to concern yourself with, you can go to a network package more easily. If you have 41 home games, you must depend upon local broadcasts for promotional value.

Chairman PACKWOOD. But you are the one that determines that you have 41 home games.

Mr. STERN. Yes, that is true.

Chairman PACKWOOD. First you say that we have 41 home games; therefore, we cannot go to the networks. That is not the networks' fault or our fault that you have 41 home games.

Mr. STERN. That is true. The only fault here right now is that we have a product that we are required to give away by virtue of the compulsory license. I mean that is the beginning. We are not asking——

Chairman PACKWOOD. Are you telling me that the reason you cannot go to a network is because you have so many home games that the network does not want to buy it?

Mr. STERN. That is correct. There is no sport that plays anywhere from 41 to 80 home games that can get every one of those games on the network. That is true, Senator.

Mr. KUHN. Senator, I might add, I said a moment ago that we had 1,600 regular season games on over-the-air television. There is no way that the networks would consider trying to bite that bullet. There is no way they could program through the week with that much baseball.

Chairman PACKWOOD. I understand that. But it seems to me a circular argument. You set your own schedules, you determine how many games you are going to play; and then you say, we play so many that the networks will not buy it and, therefore, we are disadvantaged.

Mr. KUHN. I am not saying that we are disadvantaged by not being on the network. I am saying that the National Football League has a less troublesome situation because they are. But I recognize there is no way we can do it, and I am not complaining about that fact. But nonetheless, Senator, I do not think that that in any way undermines our basic position that we are entitled to the protection of other copyright owners in this bill.

Chairman PACKWOOD. It seems to me, one, you do not like the value of the product that the CRT gives you. And I am not sure, but maybe you would be perfectly happy if they valued it at what you thought was the value so that your signals are going about the country and you would receive the revenue you would otherwise lose at home. I suppose you could carry this to the absurd, but I can see us moving to the argument where the local council of churches wants us to black out the Sunday morning religious television programs because they are competing with them for business.

Mr. STERN. Senator, is not the starting point, though, the compulsory license? The public policy question here is whether cable has come forward and justified why the subsidy of the license should be continued? The discussions of blackout only come in because the cable lobby appears to be so powerful that some legislation is going to be enacted. We are saying, do a little something for us.

But the fundamental issue is whether the compulsory license subsidy should be continued by this Congress.

Mr. **STEIN**. Certainly, for hockey we would prefer to have the marketplace decide what the value of our games are on television. And if we played a 16-game schedule, given that we are in limited arena sizes, then we could not get any hockey players to play there because you could not pay them enough out of those kinds of revenues, obviously. And then the public, to the extent that there is a constituency that enjoys hockey, would not have the hockey to enjoy.

Chairman **PACKWOOD**. You could not pay them unless you had a sufficient following throughout the country that with a relatively few home games you could have a tremendous network television contract and pay them from the proceeds of the contract.

Mr. **STEIN**. Yes; and unfortunately, we are rather new. We are not as new as the United States Football League, but other than in four cities in this country we are not even 15 years old in the United States, and we do not have that kind of following yet.

Chairman **PACKWOOD**. Senator Exon.

Senator **EXON**. No further questions.

Chairman **PACKWOOD**. Senator Kasten.

Senator **KASTEN**. I would like to address a point that Senator Pressler brought up in terms of these blackouts. In a case like in his State where there is no professional sports, that means there will be no blackouts.

Mr. **STEIN**. That is correct.

Senator **KASTEN**. The only part that we would black out is a city that has a professional sports team and they have a home game and there might be a delay or a blackout. So it would not affect any of these other States. It would not affect the great majority of the United States of America geographically; is that correct?

Mr. **KUHN**. That is correct. And I might also say that so long as we are given the power to deal with cable, it is not necessarily going to be a blackout even in the major league markets. And we have examples today where we sell to cable and they go into major league markets.

Senator **EXON**. Would you yield for a moment, Bob?

Senator **KASTEN**. Sure.

Senator **EXON**. I asked that question of the preceding panel, and the answer I got was that they would not broadcast in Nebraska and South Dakota because if you had a blackout in New York, and Philadelphia, and Detroit, and Los Angeles, they would not have the revenue to put the game on the air and, therefore we would not be blacked out but we could not see it because it would not be shown.

Senator **KASTEN**. Maybe we should ask them to respond to that point.

Mr. **KUHN**. Senator, I think opinions are very easy to get out of panels, as the opinion they gave you on that. But much more meaningful, I think, is actual practice. If you take actual practice, hockey, basketball, and baseball all sell to USA Network. We have included blackouts. We have included very extensive blackouts. USA Cable is very happy to buy that program, even with blackouts, and put it across the country wherever we permit them to put it. And they do very well with it. And they are coming back banging on our doors looking for more of that kind of product.

So I think the proof is in the pudding, in a good, hardheaded, practical example. And I think what you were told was just what they wished you would believe.

Senator **Exon**. Thank you.

Senator **Kasten**. We heard from cable interests that compulsory licensing does not result in any harm to professional sports. I would like for you to address that question. What is the harm suffered by sports that needs to be addressed? Mr. Kuhn first.

Mr. **Kuhn**. Well, it is manifold. We lose control of our own product so that we are forced to televise against ourselves. For instance, I say we might very well, if we had a free market out there, we could deal with cable, we might very well sell to cable and let them go into major league markets, but there might be some that we would protect. For instance, we would have a struggling market here or a struggling market there, a struggling team, and we might prefer not to see them competed with while they are trying to get on their feet.

But we lose control of our product the way it is now. They can willy-nilly take our product and pump it in by the hundreds and hundreds and hundreds into certain markets. So that hurts us. We lose the fair market value of our product, which is a very real concern to us. Here we are struggling and we have to sell to them at whatever rates the CRT sets, and that has not certainly been fair market value up till now. Perhaps it is getting closer to it now.

So we lose the fair market value of our product. And these are very serious problems as far as we are concerned. And on top of that, this bill without us in it promises to visit us with even worse result than we now have, as was pointed out a moment ago, if you have the syndicated exclusivity provision in this bill that is in it now, if that goes through, we are left out in the cold and the local independent stations are going to move to sports because they are not burdened with syndicated exclusivity on sports. And that is going to mean even a worsening flood of baseball, hockey, basketball, football, et cetera into these markets, to our further disadvantage.

And in addition, you have such little things thrown in there—and I do not think it is a little—as the nullification of a court decision we got in by the New York Mets against Eastern Microwave. That was upset in the court of appeals decision. We now have it on appeal to the Supreme Court, and they want to take that away from us. Another example of the kind of arrogance we are met with here in dealing with this problem.

So these things all add up, I think, to hurt us a lot both in terms of the bill that is on the table before you and in terms of the proliferation of signals into our markets that is murderous to us.

Mr. **Stern**. Senator, as Mr. Stein said before, the National Hockey League is getting $75,000 a game selling to the USA Network, which goes into perhaps as many now as 13 or 14 million homes. A hockey game that is being imported to distant signals to perhaps twice as many homes, or series of hockey games, might get, according to Mr. Stein, $700 for it. The difference between the $700 and the $75,000 is a subsidy running from the National Hockey League to the cable industry. And so the question is when you talk in terms of harm, what justifies the continuation of that subsidy at this time in light of the state of the cable industry which is now competing with the networks both for share, for programing and every other type of a business accoutrement that we are now faced with?

Senator **Kasten**. Mr. Chairman, I have some additional questions, but I think in the interest of time I will submit them for the record. But I would just like to say, to echo what Senator Long and others have said today, it seems to me that if we are going to have a solution to this problem, it has got to include all of the various people who are involved.

And I would say the same thing to you that I have said to the cable people: We are not experts and working all this out. You are, or you have people working for you that are. And some of us had hoped that during this period of time between the time when the bill came from the House of Representatives to today, that there would be people appearing before us saying, OK, we have worked these particular problems out, we now have a bill that goes forward with all five elements that are essential to a bill.

It is not going to go forward, it seems to me, with four out of five elements. And I would hope that you would do everything you could to work with these other competing interests in the next week or so, because otherwise this whole thing is going to die. And I think overall you would agree that many parts of the bill are important and good and in the national interest.

So I would hope that you could get your people together with the cable people in particular and work these problems out. They can be worked out. They are being worked out right now with blackouts and other kinds of things, and you are selling these programs throughout the country.

Mr. **Kuhn**. Senator, I will tell you for my part that I will publicly here and now instruct our people who have dealt with these problems and are prepared to deal with these problems of the cable people to contact them today to see if the cable people are willing to sit down and talk to us.

Mr. Wheeler said—you got some marvelous answers a while ago from Mr. Wheeler—he said, well, we talked to somebody up in your State, some owner. Why not talk to me? Why not talk to the commissioners of these sports? Why not talk to our representatives here in Washington? None of us have been talked to.

Mr. **Stein**. They have not spoken to anybody in hockey, I can tell you that.

Senator **Kasten**. Mr. Chairman, thank you.

Chairman **Packwood**. Bob, I might say to you and the others, since this hearing has started, and I cannot speak for the Judiciary Committee members—I have had six different members of the Commerce Committee ask for a delay of the markup. They do not understand this. They are not prepared to jump into it.

And so I am going to delay it until Wednesday rather than Monday. I want to be sure that everybody here—at the moment there is a hubbub of confusion, at least on the Commerce Committee members' side on this. And I think what Bob says is very accurate. There is enough confusion among the members that I think there would be no bill at all unless that confusion is resolved.

Senator **Kasten**. Mr. Chairman, I am not one of those six. Maybe I would become the seventh, and I would be happy to, but I think what is important is that we are not experts in this very complex area of the law, and we are trying to negotiate, and the solutions are going to have to be worked through with our staff but most importantly with the experts and the staff and legal counsel of these various competing interests.

I am confident that a solution can be worked out. Mr. Ehrhart said that there would be several ways of working it out, and some have been suggested here. But I think it is incumbent upon the parties that are interested in the overall bill to understand that we have got maybe 10 or 15 days before the legislative session is over, and during that period of time we either have a solution which takes all the parts, or we do not have a bill, I guess.

Thank you, Mr. Chairman.

Chairman **Packwood**. Let me again say by and large I think this is not a bad bill, and I do not have grave misgivings about it. But having been on this committee a long time and presided over it a bit and the sense of this Congress and the sense of uneasiness that I am feeling on the committee, I just think that there are, despite my general support, problems that time and conflict may resolve more than we may resolve.

Gentlemen, thank you very much.

Mr. **Kuhn**. Thank you, Mr. Chairman.

Chairman **Packwood**. Mr. Hubbard, Mr. Hutcheson, Mr. Guernica, and Mr. Thompson.

Gentlemen, thank you for your patience. We appreciate it.

We will start with Mr. Hubbard, the president of United States Satellite Broadcasting Co.

STATEMENTS OF STANLEY S. HUBBARD, PRESIDENT, U.S. SATELLITE BROADCASTING CO.; RICHARD G. HUTCHESON III, PRESIDENT, AMERICAN LOW POWER TELEVISION ASSOCIATION; ANTONIO GUERNICA, EXECUTIVE VICE PRESIDENT, NATIONAL ASSOCIATION OF SPANISH BROADCASTERS; AND TOM THOMPSON, SUBSCRIPTION TELEVISION OF GREATER WASHINGTON

Mr. **Hubbard**. Thank you, Senator. I am very pleased to be here, and I thank you very much for giving us an opportunity to speak. I am speaking on behalf of the U.S. Satellite Broadcasting Co., a new broadcasting company which was just licensed on November 4 to enter into the new field of direct broadcast satellites.

I have to tell you at the outset, Senator, nobody invited us to talk about what might affect our new industry either, and we are a brand new industry. I think that we offer a great deal to the American people in that we are going to provide new jobs, we are going to provide an opportunity for the American people no matter where they live to receive broadcast service that they heretofore have not received. And I think that as far as the American people are concerned, what we are proposing is a very, very important service indeed.

As a matter of fact, Senator, the Commerce Committee of the House of Representatives sent an Intent of the Congress letter to the Federal Communications Commission urging them to go forward and authorize direct broadcast satellite service. So we are the "new kids on the block," so to speak.

Chairman **Packwood**. Let me for the record so that everyone understands what you are doing and make sure I understand, you are going to be broadcasting from transmitter to satellite and either to points at home or maybe getting some local stations to buy your product. But basically you are bypassing cable unless they want to buy your product and use it. Is that correct?

Mr. **Hubbard**. Well, no, sir. Our company is thinking about providing free over-the-air advertiser supported programing to everybody in America. We would welcome any cable company which wishes to carry our service to carry the service. We would not ask them to pay us for the right to carry that programing.

Chairman **Packwood**. But you are not dependent on them?

Mr. **Hubbard**. Well, we may be dependent on them, Senator, initially. And what is very interesting about this thing is that we think there is a lack of fairness, and we think the American people are going to be the losers. For example, this bill, which really is a special-interest bill—and, Senator, I am a broadcaster, I own three television stations and five radio stations, and I am not at all interested in seeing the broadcasting business fail, either television or radio. And I think I am a good broadcaster.

But this bill unfairly treats a brand new portion of the broadcasting industry, the direct broadcast satellites. The bill provides, for example, that any new television station which shall be allocated and authorized by the Federal Communications Commission after November 1, 1981, shall not have carriage on cable systems, whereas all existing television stations will have carriage on cable systems.

We think that is patently unfair. We think that if a new television station, for example, were to be authorized and dropped into Minneapolis-St. Paul, where I live, that station should have the same entitlement to carriage on the cables as our existing station, which was No. 5 in the United States.

We think that is a matter of fairness. We think that to the extent, Senator, that direct broadcast satellite signals are available free over the air to an American citizen in his or her home, that we should be treated like other free over-the-air broadcast signals which are available to those homes. This bill specifically says that we shall be excluded.

Now, it has been suggested that since a direct broadcast satellite licensee shall have more than one broadcast signal, that perhaps the cables ought not to have to give us a special position by saying that they will carry all of ours. And we think that is fair. We would suggest, in answer to that criticism, that perhaps a cable system should not have to carry more than one free over-the-air broadcast signal for each direct broadcast satellite operator.

And I think it is also important to note, Senator, that not all direct broadcast satellite operators propose free over-the-air advertiser supported signals. Some have proposed pay, some have proposed things that really are not broadcasting in the sense of free over-the-air broadcasting. All we are asking for, Senator, is fair and equal treatment.

We have had some people say to us, why should you be carried when the low-power television stations are not carried? I think that is a very fair question, and I would answer it in the following manner, Senator. I would say that in a small market such as River Falls, Wis., or such as Little Falls, Minn., it may very well be that the low-power television station will become the only or the closest thing to a full-service television station that community will ever have. Well, we say, in that instance, the cable should have to carry that low-power television system, just as they would have to carry local television stations.

In a large market, however, such as Washington, D.C., and New York City, Minneapolis-St. Paul, a small-power, a low-power television system cannot provide the service that a full-service television station can provide. They will only service a small part of the market, and we think that they are then only entitled to carriage to the extent that they are receivable free over-the-air in the homes of the people watching television.

All I want is fairness. We are the new guy on the block. We are a brand new industry. We are going to provide thousands and thousands of jobs. I understand that the market potential for the sale of direct broadcast receivers alone at a cost of $300 each is over $25 billion. So you can see that this is going to provide tremendous impetus to the economy if it is given a chance to live and to survive. But we want a chance to operate in the free marketplace, and we want to do it on the same basis as our competitors.

Thank you, Senator, for the time.

[The statement follows:]

STATEMENT OF STANLEY S. HUBBARD, PRESIDENT, U.S. SATELLITE BROADCASTING CO.

I appreciate the opportunity to speak to you today about fairness. As you know, Congress has always been interested in the question of fairness as evidenced by such doctrines of broadcast regulation as the Fairness Doctrine and the Equal Time Provisions.

Fairness and evenhanded treatment is an important consideration when the government deals with businesses which compete with each other in the marketplace. In considering H.R. 5949, however, there are reasons for guaranteeing fairness which go beyond the important question of fairness itself.

The United States, since the beginning of electronic communications, has always been the world leader. It is sad to note that to a degree, we have been displaced in that role by the Japanese. I, as a broadcaster, and our company, as a DBS permittee, are obliged to recognize that the Japanese have made many significant contributions to the art of electronic communications. As Americans, however, our first concern is for the United States and in that connection, DBS offers an opportunity for the United States to regain momentum in the area of electronic communications.

As written, the proposed copyright bill poses considerable danger to the unique opportunity which direct broadcast satellite broadcasting can provide for America to regain our electronic mass communications leadership.

A year ago in December, I appeared before the House Subcommittee on Telecommunication at which time I was able to describe the great possibilities which the advent of DBS provides to the United States for the creation of a healthy, indeed what promises to be a remarkable, new industry, if given the chance.

The direct broadcast satellite industry will provide tens of thousands of new job opportunities for Americans and will provide a tremendous worldwide market for satellites, transponders, launch vehicle use, earth transmit telemetry stations, earth receive stations, home receiving dishes, and new TV sets with built-in DBS capability. Of course, all of this means more jobs and a more favorable balance of trade for the United States. In addition, there will be thousands of new jobs provided for the development of software and technical and other personnel needs within the broad DBS industry itself.

This past June, the Federal Communications Commission authorized direct broadcast satellite broadcasting for the United States. As of November 4, all of the license applications have been acted upon, and there are now eight permittees in the DBS service. Indeed, a sense of the Congress letter was transmitted from the Communications Subcommittee of the House of Representatives to the FCC encouraging the FCC to do what it can to help develop DBS.

I think it is obvious the development of a successful DBS system within the United States is certainly in the national interest. The proposed Cable Copyright Bill H.R. 5949 poses a threat to the development of this new industry in that it places the United States government in the position of granting unfair advantage to competitors of DBS in the area of regulation.

Specifically, H.R. 5949 provides that CATV systems shall have to carry the programming of existing broadcasting stations. H.R. 5949 does not provide for the carriage of the television stations which should need carriage the most. That is, many new television stations which will have been licensed after November 1, 1981. For example, if the Federal Communications Commission should decide to establish so-called drop-in television stations, these stations could not demand carriage on a local cable system whereas the established stations would be carried by virtue of the mandatory carriage rules.

H.R. 5949 provides that CATV's shall not be required by the Federal Communications Commission to carry the signals of any new television services which will be placed in the table of allocations after November 1, 1981. Yet, the newest television delivery system for the benefit of the American people is the DBS service which will not come on line until some time after 1985. Therefore, H.R. 5949 is discriminatory in that cable television systems will be required to carry the signals of existing television stations as of November 1, 1981 but will be specifically relieved from any requirement to carry any new television services which are licensed, as are local television stations, to serve the viewing public in their homes via direct, over-the-air reception and which come on line after November 1, 1981.

Thus, H.R. 5949 continues the FCC's authority to require cable television systems to carry the signals of television stations operating on channels allocated on or before November 1, 1981, while at the same time it would specifically preclude the FCC from requiring those systems to carry new television stations and new services such as free, over the-air direct broadcast satellite (DBS) service.

Under H.R. 5949, therefore, existing television stations will have a significant and unfair advantage in the marketplace over new stations and services. This will result in discriminatory barriers to market entry for new television services. This discriminatory protection for existing services will only serve to deprive millions of American people of valuable free, over-the-air television programming such as the DBS service that United States Satellite Broadcasting Company will provide.

Our nation's television system provides the finest free, over-the-air television service in the world. It should be preserved and enhanced. This can best be accomplished in a non-discriminatory marketplace where new television services are allowed to compete on an equal and fair basis with existing services. H.R. 5949 should be amended to eliminate its discriminatory provisions. Specifically, we propose the following:

Direct broadcast satellite systems which operate in the same manner as terrestrial stations should be treated similarly. That is to say if the federal government is going to require that a cable system carry any free, over-the-air television signal, then it should be required to carry all free, over-the-air television broadcast signals which are available to the viewing public directly in their homes. I would certainly favor an amendment to the Act which would put all on an equal basis and which would ensure equal non-discriminatory treatment for everyone.

The American public is entitled to the broadest possible broadcast service, and the Congress should not be made an unwitting instrument of discrimination by leaving out new broadcast stations and services.

Chairman PACKWOOD. If you broadcast as timely as you testify, you will do very well.

Mr. Hutcheson.

Mr. HUTCHESON. Mr. Chairman, thank you very much. Those of us involved in the low-power television industry very much appreciate the opportunity to make our case before you here today.

The low-power television industry is very concerned with the must-carry provisions of H.R. 5949. In essence, the bill tells the

FCC that it may not under any circumstances require the carriage of a low-power television station on a cable system. The practical impact of this provision is to shut low-power television stations out of cable systems and markets which both serve. This would deal a very serious blow to the economic viability of many low-power stations as they begin broadcasting.

From the low-power point of view, it is bad enough that the bill does not extend must-carry protection to low-power stations, but we believe that it is particularly unfortunate that the legislation takes away from the FCC the ability to even consider granting us this protection in the years to come.

And in our view, the timing of this is particularly unfortunate because low-power is just now beginning to get under way. There are now about 35 low-power stations broadcasting. There are construction permits for another hundred stations already granted, and many of these stations will be coming on line in the next 6 months. Thanks to repeated intervention from the Congress, for which we are very grateful, the FCC no longer has any excuses for failing to process the 7,000 low-power applications now on file. And the FCC is now predicting that by the spring of next year somewhere between 250 and 500 low-power stations are going to be processed per month.

So the point is low-power is here, it is a reality, and the issue of carriage on cable systems is not going to go away. Low-power stations are going to be opening up in markets where a third or more of the TV homes may be wired for cable. And if a low-power station starts broadcasting and is shut out from those cable homes, it is going to be very tough for that low-power station to make a go of it. And yet, in many towns, the low-power station is going to be the only source of local television in that community, the only source of local news, local sports, local current events, the weather.

Low-power stations make it possible for rural areas and small towns which in the past have had to rely on full-power stations from distant cities to have their own local TV stations. Gaining access on cable is just as important for a low-power station serving a small town as for a full-power station serving a major metropolitan market.

Now, it is true that the bill in question does not prohibit a low-power station from getting on the cable system by cutting a local deal, and some would argue that that is the way it should be, that the marketplace will adjust to the situation if cable viewers want to see the local TV station. But as Chairman Kastenmeier observed earlier today, that is fair for those who are already in the game. The problem is that the big guys who are already out on the field, the full-service stations get on the cable system automatically and the low-power stations have to fight for the scraps, for the channels that are left over.

This is not only unfair, but it puts us at a significant disadvantage in making our case to the cable operator. It is easy to understand why the people that are already in the game, the full-power stations and the cable operators, are not anxious to see the cable carriage or the must-carry situation sliced into smaller pieces. But from our point of view, it is not good public policy to exclude from protection those low-power stations which are providing a direct service to the community.

This results in squeezing out local stations. And I appreciate your having raised this question earlier, Mr. Chairman. It is our view that must-carry protection should be based on the nature of the service being offered and not the wattage of the station. I do not believe it would be difficult to provide a workable, simple, and perhaps secondary must-carry provision for low-power stations dependent on the number of cable channels, the viewership of the low-power station, on whether or not there were any other broadcast stations in the market, on whether or not the low-power station was doing local programing, and on whether or not the low-power station was free to all viewers.

I think, to sum up, that there is a very strong case that can be made for giving low-power stations must-carry protection. But at a minimum, I would hope that the Congress would at least give the FCC the discretion to consider this issue in the coming years as many low-power stations are going to be coming on line.

So I appreciate, Mr. Chairman, very much the opportunity to have made these points to you this morning.

[The statement follows:]

STATEMENT OF RICHARD G. HUTCHESON III, PRESIDENT, AMERICAN LOW POWER TELEVISION ASSOCIATION

Mr. Chairman, distinguished committee members, it is a privilege to be before you today, representing the low power television industry. I am speaking as President of the American Low Power Television Association. Out Association was formed in 1978 for the purpose of urging the FCC to adopt a low power television rule. Nearly 200 applicants and licensees, representing approximately one-third of the applications on file at the Commission, have joined our Association. Since the FCC adopted the final low power television rules in March of this year, we have been devoting our efforts to seeing that the LPTV industry gets off to a healthy start.

In my remarks today, I am also joined by the National Institute for Low Power Television, whose Director has endorsed the position I will be outlining. The Institute, another organization devoted to supporting LPTV, has held several successful conventions and trade shows for LPTV applicants and licensees. I have also consulted with officials of the National Translator Association in preparing my remarks. Although the Board of NTA has not taken a formal position on H.R. 5949, the issues I will be discussing today are of great concern to many NTA members.

The legislation before you today, H.R. 5949, could have a significant and very damaging impact on our new industry, if it is enacted into law as passed by the House of Representatives. For this reason, I am grateful for an opportunity to spell out for you our concerns.

In my remarks, I wish to do four things. First, I will discuss the status of the low power television industry, and describe the dramatic growth which we expect to occur in the coming year. Second, I will discuss that aspect of H.R. 5949 which could cause great injury to the LPTV industry, and the reasons it is so harmful to LPTV. Third, I will list some of the arguments commonly cited in opposition to our position. And, finally, I will address these arguments, and indicate why I believe it is imperative that the Congress not enact H.R. 5949 without amending it to reflect the concerns of the low power television industry.

First, let me bring the Committee Members up to date on the status of LPTV. Although LPTV is today merely a faint imprint against the picture of the larger telecommunications industry, it will not be long before it assumes a much more visible and significant role.

Let me express my gratitude to the Committee Members here today and to the Congress in general for the forceful intervention of the Congress, on numerous occasions, in behalf of LPTV. If it were not for the Congress, the Commission would never have given the final go-ahead to the LPTV service in March of this year. Just as significantly, the congress reacted to repeated FCC protests that it lacked the means to process the huge backlog of 700 or more LPTV applications by giving the FCC the tools and the resources to do the job.

Congress has twice passed a lottery statute, which will make possible the speedy selection of a licensee from among numerous mutually exclusive LPTV applications. Congress has provided funds for computer-assisted processing of LPTV applications, and for additional processing personnel. Because of these congressional actions, the FCC is now left without any valid excuses for failing to greatly speed up the processing of LPTV applications.

To date, the FCC has issued approximately 230 construction permits for LPTV stations, of which more than half are for the continental United States. Some 35 low power TV stations are already on the air. Most of the remaining stations for which construction permits have been granted are likely to debut within the next six months, (or risk forfeiting their construction permits).

FCC personnel responsible for LPTV processing have recently predicted that with the coming on line of the computer and the lottery in the Spring of 1983, the FCC will be able to process somewhere on the order of 500 LPTV applications per month. If the FCC does even half as well as projected, it is likely that more than 1,000 grants will have been issued by this time next year. Most states will see quite a few LPTV stations operating.

In short, LPTV is a reality. It is no longer merely an idea. By this time next year, it will be a visible and important player in the telecommunications industry. However, the viability of the new LPTV industry is threatened by a provision of H.R. 5949. The Bill instructs the Federal Communications Commission that it ". . . shall not require the carriage of . . . any broadcasting station . . . which operates pursuant to an authorization by the Commission as a low power broadcasting facility . . ." In short, the bill would place a legislative impediment in the way of the FCC from even considering whether or not to grant LPTV stations must-carry protection on local cable television systems.

The practical impact of the provision just cited is that it will shut LPTV stations out of cable systems in many of the markets served by both. As a consequence, the provision could deal a serious blow to the economic viability of LPTV as it begins broadcasting in many communities.

The cable television industry is large and growing. One out of every three homes is wired for cable today. By the end of the deacde, one in every two homes may be wired. As a practical matter, a cable subscriber is unlikely to go to the considerable trouble of disconnecting the cable from the TV set in order to receive a local broadcast signal which is not distributed by the cable system. This may mean that a LPTV station debuting in a market will not have access to one-third or one-half of the TV homes in the market. In addition to the fact that it will be extremely difficult for cable viewers to enjoy the programs on the LPTV station, being denied access to the cable homes will seriously limit the LPTV operator's ability to attract local advertising dollars.

To be sure, if a cable subscriber is determined enough to view the LPTV station, it is possible to do so. Not every TV set in the house is likely to be wired. The cable viewer may have an "A–B" switch installed, to simplify switching back and forth from programming which is carried by cable to programming which is not. In some cases, a subscriber to a 12-channel cable system may be able to receive a UHF LPTV signal without disconnecting the cable, although this has the potential to cause interference to nearby TV viewers.

Clearly, the advantage of being carried by the cable system is so great, and the convenience for the TV viewer so manifest, that few full service TV stations would be willing to give up cable coverage. And beyond the whole issue of convenience to the TV viewer is the issue of reception. Cable carriage is likely to bring a much clearer picture to TV viewers on the outer fringes of a LPTV station's coverage area.

In short, whether or not the local cable system carries the local LPTV station is likely to determine whether or not the cable home has access to the LPTV station. Without access to cable homes, it will be very difficult for a LPTV station to survive in a market.

Opponents of a must-carry rule for LPTV stations make several arguments. They observe that nothing in H.R. 5949 prevents a local cable system from distributing a LPTV station. If cable subscribers are interested in the programming offered by the LPTV station, surely the cable operator will respond to marketplace pressures and place the LPTV station on the cable system.

Opponents of must-carry for LPTV argue that it is not possible to saddle the cable industry with additional must-carry rules every time a new communications technology comes along. If LPTV why not MDS, STV, or DBS? The line must be drawn somewhere. Those full service stations which have must-carry protection are also required to comply with numerous and expensive public service obligations which are not required for LPTV stations. Must-carry protection is merely a compensation for a heavily regulated broadcast service.

Furthermore, there may be several LPTV channels licensed in a community. Which ones must be carried by the cable system? LPTV is a new service which may not develop much of a following. There are only a limited number of channels on cable systems, particularly those serving smaller markets. It would be unfair to force a cable operator to drop a lucrative or popular channel to make room for the local LPTV signal.

It is not surprising that broadcasters already enjoying the protection of mandatory cable carriage do not wish to share it with newcomers; nor is it surprising that cable operators are not anxious to lose discretion over additional channels in their systems. Certainly existing broadcasters and cable operators have no interest in seeing a new category of broadcasters develop, flourish and slice off a share of an increasingly fragmented television viewing audience. But to grant protection to full power broadcasters while denying it to low power broadcasters would be grossly unfair.

The provision denying LPTV stations must-carry protection on cable systems has the effect of dealing a potentially crippling blow to a new player before LPTV has the opportunity to develop as a television service in areas presently underserved by full service television stations.

The FCC is processing LPTV stations in three "tiers." At the present time, only applications in markets located more than 55.5 miles from the 212 ranked television markets are being accepted. As a consequence, LPTV will be coming first to areas which are relatively starved for TV choices. Most "tier one" areas lack the local television service provided by full service TV stations to larger urban markets.

LPTV stations are mini-TV stations. They are scaled down to a size which makes it economically feasible for smaller towns and rural areas to have their own TV stations. Communities which in the past have had to rely on big cities for broadcast television may now support their own local TV station, and receive TV coverage of news considered too parochial for coverage by the big city stations. In many towns, the low power television station will be the only local vehicle for television coverage of local news, weather, sports, current events and public affairs.

To provide must-carry protection for full service TV stations while denying it to LPTV stations discriminates against television services for smaller towns and rural areas.

Some cable systems, particularly those systems serving large markets, do produce local TV programming. However, the great majority of cable systems serving smaller markets do not provide extensive locally originated programming, and many do no local programming at all. Most small market cable operators are in the business of retailing TV programming originated elsewhere.

Furthermore, cable TV is available only to paying subscribers. Other TV technologies—MDS, full power STV, and in the future, DBS—are also available only to those who pay to purchase a decoder or dish, or to paying subscribers. By contrast, LPTV stations operating on an advertiser-supported or non-profit basis are available for free to all TV viewers within range.

There is an understandable appeal to the "marketplace" argument against must-carry for LPTV stations. If local cable subscribers want a particular LPTV channel distributd by the cable system, the cable operator will respond; why burden the cable operator with additional regulations? Surely many local cable systems will pick up the LPTV channel without prompting.

Unfortunately, the limited evidence already in suggests the reverse. Some of the 35 LPTV stations now broadcasting have been denied access to local cable systems—and for all intensive purposes, to the TV homes served by those cable systems. This stacks the cards against the viability of the LPTV station before it has a chance to demonstrate its importance to the community it wishes to serve.

To force a local LPTV station to fight for carriage on a local cable system—which may view it as a competitor—while guaranteeing access to full service broadcast stations serving distant, larger communities, is anomalous and unfair. This is protection for the strong and developed, and illusory marketplace freedom for the weak and developing. Must-carry protection for LPTV stations serving smaller markets is no less justifiable than must-carry for full service stations serving larger markets.

If demand from subscribers will move cable operators to carry local LPTV stations, surely this is no less true for full service broadcast stations. LPTV operators do not want special treatment—just parity. If LPTV operators must compete in the marketplace for cable carriage, so should full service broadcasters. If public policy requires carriage of broadcast stations on cable, it should do so consistently—to mini-TV stations serving smaller markets as well as to full service TV stations serving larger markets.

Because LPTV is largely an unregulated service, LPTV stations will offer widely varied sorts of programming. In some cases, the argument for mandatory cable carriage of LPTV stations will be stronger than others. However, to suggest—because LPTV is free from many of the public service requirements imposed on full power TV stations—that there are no circumstances under which must-carry protection should be granted to LPTV stations, ducks the most important justification for discrimination.

If must-carry protection is to be granted to any broadcast stations, it ought to be crafted to take into account the TV services being offered to the community, be the community—or the TV station—large or small. While it may be simpler to draw an inflexible line excluding LPTV from mandatory carriage on cable systems, pointing to the confusion engendered by all the new TV technologies, this is not the basis for a sound public policy.

Instead, whether or not mandatory cable carriage is granted should depend on the nature of the television service, not the wattage of the transmitter. To some degree, H.R. 5949 does this already. Channels with fewer than a one per cent share of viewing hours in noncable homes, or a two per cent of all TV housholds in a county do not receive must-carry protection. Cable systems with 36 or fewer channels have substantially fewer must-carry requirements. There is no reason that a secondary must-carry status cannot be developed for lower power television, as well, conditioned upon reasonable criteria. Reasonable criteria could include:

Is the LPTV station the only broadcast station serving the area also served by the cable system.

Is the TV station free to viewers (advertiser-supported, public TV, non-profit TV) for part of the broadcast day, or is it limited to paying subscribers. Strictly pay-TV operations, in direct competition with cable, will have a more difficult case to make for cable carriage than services available to community TV viewers without charge.

Is the TV station providing any coverage of local news, weather, sports, or public affairs, or is the station exclusively a local purveyor of programming originated elsewere?

Other issues may also be dealt with without undue difficulty or complexity. Carriage on cable systems with fewer than 36 channels could be limited by the availability of open channels. The choice among competing LPTV stations need not be regulated by law, provided that one or more LPTV stations being carried by the local cable system engages in some locally originated programming. In any case, it should not be more difficult for a local LPTV station to gain access to a table system in the same community than for a full service TV station imported from many miles away.

To recapitulate, I have attempted to indicate why the provision in H.R. 5949 which would bar the FCC from granting must-carry protection to LPTV stations could seriously damage the new LPTV industry. It may be difficult for a new LPTV station to survive in a market where it is shut out from the one-third or more of the TV homes in the area which are wired for cable.

It would be terribly unfair to continue mandatory cable carriage protection for established full service TV broadcasters while denying it to new low power TV broadcasters. This unequal application of protection also benefits larger markets, already served by multiple full power TV stations, to the detriment of smaller markets, for which LPTV may be the only vehicle for local television coverage.

If cable carriage for LPTV stations is to be left to the discretion of cable operators, so should be the carriage for full service broadcasters. If any television stations are to be granted mandatory carriage on cable systems, this protection should be related to reasonable criteria linked to the benefits the TV station is offering the community being served, not the wattage of the station. As LPTV stations may offer many different sorts of programming services, it would be suitable to provide a secondary must-carry protection to LPTV stations, taking into account both the availability of cable channels and the nature of the LPTV programming service.

Finally, I urge the Committee Members to address the issue of cable carriage for LPTV in the context of H.R. 5949. As I have indicated, there is every reason to believe that the coming year will see a large number of new LPTV stations licensed and broadcasting. The issue of cable carriage for LPTV will not go away, but instead will become an issue of increasing concern, both to LPTV operators and to TV viewers in the communities they serve.

If must-carry privileges for full service TV stations are to be codified, then this is the time to extend similar protection to LPTV stations which are providing useful services to the residents within range of their signals.

At a minimum, Congress ought to preserve the status quo—and the ability of the FCC to respond to the problem of must-carry for LPTV stations—by deleting the reference to LPTV in H.R. 5949. While such an action would not bring either relief or equal protection to LPTV stations, it would at least avoid the invidious consequences for LPTV stations of H.R. 5949 as passed by the House. LPTV operators would at least be free to make their case to the FCC.

I appreciate the opportunity to have testified before the two Committees today on this issue of vital importance to the low power television industry. Thank you very much.

Chairman PACKWOOD. Good presentation. Thank you.

Mr. Guernica.

Mr. GUERNICA. Thank you, Mr. Chairman and members of the committee for the opportunity to testify on behalf of the National Association of Spanish Broadcasters and the Spanish television industry of this country.

The National Association of Spanish Broadcasters represents Spanish-format radio and television stations in the United States and Puerto Rico. Every Spanish television station in the United States is a member of the association.

The Spanish language broadcast media in the United States provide a diversity of opinions and ideas, a voice that would not be heard were it not for Spanish media. Spanish broadcasting serves as a primary source of news, information, and entertainment for the 15 to 20 million Hispanics in this country, providing a vital and unduplicated service.

Currently, there are 13 Spanish language television stations and 8 low-power Spanish stations on the air in the United States, including 1 in Washington, D.C., Channel 14. Together, these stations provide Spanish programing service for approximately 70 percent of the total U.S. Hispanic population.

I will get right to the point of our testimony, and that is the audience levels that are required for the carriage of Spanish television stations.

Substantial deficiencies in the audience measurement methodologies used by Arbitron and Nielsen in measuring the Hispanic audience are longstanding and have been documented for years. Yet under this bill it is precisely Nielsen and Arbitron ratings that will determine the carriage of Spanish television by the cable systems. Moreover, the bill calls for countywide data when no accurate Hispanic audience data is available on a countywide basis.

Spanish television's entire broadcast day is conceived, developed, and produced to meet the programing needs and interests of the Hispanic, not the general, audience. Yet H.R. 5949 will base carriage of the Spanish station on its ability to attract a general audience when the share of the general audience reached by the Spanish stations bears little relationship to the demand that exists for the programing service in the relevant community, the Hispanic population.

What it all comes down to is that under this bill, inaccurate measurements and an irrelevant audience standard will determine whether or not Spanish television stations will be required carriage for the cable system.

In theory, one of the intents of H.R. 5949 is to enhance programing diversity. In practice, it will diminish programing diversity by severely curtailing the availability of Spanish television, a vital and unduplicated broadcast service.

Should H.R. 5949 be adopted as written, Spanish television service could today be dropped by at least 79 cable systems in 35 counties. The prospects for carriage of new Spanish signals or of existing Spanish stations by new cable systems would also be in jeopardy.

We are not arguing today for the exemption of Spanish television from meeting an audience standard, notwithstanding that based on audience impact, Spanish television does merit as much, if not greater, consideration than other broadcast services that have received favored status under this bill. In independent rating surveys, using the personal interview methodology, Spanish television's share of the Hispanic audience ranges from 33 to 65 percent. Clearly, there is a most significant demand for the programing service in the relevant community.

For Spanish television to receive equal treatment under this bill, the audience standard for Spanish stations should rightfully be applied to the relevant audience, the Hispanic population. And the data source used to determine the Spanish stations' audience levels should rightfully reflect an accurate measurement of the Hispanic audience.

In closing, let me add to what many people who have testified today have said. Spanish broadcasting has not been party to this agreement, and it is impossible to lay your cards on the table if you have not been dealt in. I am really surprised at the number of people who have an interest in this decision and were not party to this agreement.

Thank you very much.

[The statement follows:]

STATEMENT OF ANTONIO GUERNICA, EXECUTIVE VICE PRESIDENT, NATIONAL ASSOCIATION OF SPANISH BROADCASTERS

Mr. Chairmen and members of the Senate Committee on Commerce, Science and Transportation and the Senate Committee on the Judiciary:

Thank you for giving me the opportunity to testify on H.R. 5949 on behalf of the National Association of Spanish Broadcasters and the Spanish television industry of this country. The National Association of Spanish Broadcasters is a broadcast association that represents Spanish format radio and television stations in the United States and Puerto Rico. Every Spanish television station in the United States is an active member of the Association.

The Spanish language broadcast media in the United States provide a diversity of opinions and ideas, a voice that would remain silent were it not for Spanish media. Spanish broadcasting serves as a primary source of news, information and entertainment for the 15 to 20 million Hispanics in this country, providing a vital and unduplicated service to the Hispanic audience.

Currently, there are thirteen Spanish language television stations on the air in the United States. These stations are all in cities with high Hispanic concentration in their population; six are located in the top five cities in Hispanic population. In descending market order, the cities with Spanish language television service are New York, Los Angeles, San Antonio, Miami, San Francisco, Chicago, Phoenix, Arizona; Fresno, California; Corpus Christi, Texas; Sacramento-Stockton, California; Dallas-Ft. Worth, Texas and Salinas-Monterey; California. With the exception of New York, there is but one Spanish television station serving each of these cities.

Spanish language television service also reaches the Hispanic audience through low power television stations in Tucson, Arizona; Bakersfield, California, Denver, Colorado; Hartford, Connecticut; Tampa, Florida; Austin, Texas; Albuquerque, New Mexico; and Washington, D.C. The Spanish language television stations together with the low power television stations provide news, information and entertainment service for approximately 70 percent of the total U.S. Hispanic population in the United States.

Unlike ABC, CBS, NBC and the English independents, every moment of Spanish television's broadcast day is conceived, developed and produced to meet the programming needs and interests of the Hispanic audience it serves. During a typical broadcast week, a Spanish television station will offer local, national and international news programs, talk shows, situation comedies, dramas, soap operas, variety shows, sports, game shows, children's programming, movies, public affairs programs and possibly a special or two.

The changes in the "must carry" rules for cable systems proposed by H.R. 5949 will severely curtail the availability of these services to the Hispanic audience. Under the present Federal Communications Commission (FCC) "must carry" regulations, cable television systems are required to carry all local television signals within a 35-mile zone of their home country and other nearby signals with significant veiwership in the cable system's home country.

For all intents and purposes, the adoption of H.R. 5949 would change these rules and require a cable system to carry a local signal only when it receives a one percent share of non-cable television households in the county or a two percent share of the home county's total households.

On its face, the one percent share of county non-cable homes or the two percent share of total county households required for carriage appears to be a modest and reasonable determination. It is argued that a television station that does not consistently generate these shares of audience is not valued by the audience and will not generate sufficient revenues to remain in business for very long. However, as it applies to Spanish language stations, this assumption is not as simple or as reasonable as it first appears.

Substantial deficiencies in the audience measurement methodologies used by the two major ratings services, Arbitron and Nielsen, in measuring the Hispanic audience are long-standing and have been documented for years. The wide discrepancy in the audience size reported by Nielsen and Arbitron for Spanish television and the actual size of the audience is based on their reliance on the diary as the primary recording instrument in ratings surveys and on the telephone call as the primary placement technique used to measure the Hispanic audience.

The rate of diary return in the general population is approximately 55 percent of the diaries placed in the home. the rate of diary return from Spanish homes fluctuates between 15 and 25 percent of the diaries placed. A response rate as low as 55 percent would make one question the preciseness of the survey results. A response rate of only 15 to 25 percent would most certainly lead one to doubt the accuracy of any results derived from such research. Both Nielsen and Arbitron make extensive use of diary in arriving at their audience figures.

The use of the telephone as the primary method for placing a ratings diary in the home also leads to inaccurate Hispanic audience measurement. Although there are no national figures available for the percentage of non-telephone homes in the Hispanic population, studies conducted in 1976 arrived at an incidence of non-telephone homes in the Spanish population of 33.1 percent for New York and 24.1 for Los Angeles. At least in these two cities, reliance on the telephone leads to inaccurate measurement. The systematic exclusion of non-telephone homes means that a substantial percentage of the Hispanic population is not being surveyed.

To its credit, Arbitron has instituted special techniques designed to potentially include non-telephone homes in eight cities with large Hispanic populations. It is not known, however, whether the number of non-telephone homes surveyed has any relevance to the incidence of non-telephone homes in the Hispanic population. And while techniques instituted by Arbitron have raised the rate of Hispanic homes that return ratings diaries, the use of these techniques is limited to eight cities and to census tracts with Hispanic population penetrations of 35 percent or higher.

There are additional problems with Nielsen's and Arbitron's placement techniques. The first contact made by Nielsen and Arbitron when attempting to place a diary in the Hispanic home is initiated in English. Should the respondent answer in Spanish, the interviewer switches to Spanish, if he or she is bilingual. If the placement interviewer is not bilingual, the call is transfered to an operator who does speak Spanish or else the respondent is called back later by a Spanish speaking operator.

Given the initial use of English by the interviewer, the Hispanic respondent could well feel some pressure to respond in English, even if he or she feels more comfortable speaking Spanish. This English language atmosphere may influence the choice of language used by Hispanic homes to fill out the diaries and may indeed indirectly bias the choice of programming recorded away from Spanish television and towards English television.

In 1966, Arbitron conducted an experimental Special Study for the Spanish television station in San Antonio. Through the use of a telephone coincidental methodology, Arbitron arrived at an average weekday primetime audience of 30,000 homes for the Spanish station. Arbitron's regular ratings report for the same period, based on a diary methodology, arrived at an average weekday primetime audience of 3,000 homes or one-tenth of the audience reported in Arbitron's Special Study.

In 1975, Arbitron conducted a Telepoll for Spanish television in New York, combining the use of diaries with telephone interviews. This study arrived at a primetime average twice that of its regular ratings report.

And Arbitron has proved to be the more accurate of the two major ratings services in measuring the Hispanic audience and the more responsive in attempting to improve its methodologies.

In 1977, Nielsen conducted special studies of self-identified Spanish speaking homes in Laredo and El Paso, Texas. In Laredo, 87 percent of these self-identified Spanish homes returned an English diary. In El Paso, 75 percent returned a diary in English. The extremely high degree of diaries returned in English would lead anyone to question the validity of the study results as truly representative of Spanish speaking homes in these two cities. Laredo's total population is 114,000, of which 94 percent or 107,000 are Spanish speaking. In El Paso, 72 percent of its total population of 663,000 people is Spanish speaking; 474,000 Hispanics.

It is particularly interesting to note that this study represented a special effort by Nielsen to measure the Hispanic audience. It makes one wonder how much further off the mark Nielsen is in their regular reports in its measurement of the Hispanic audience.

Suppose that the Congress commissioned a study of English speaking homes and 75 percent of the data came from homes that responded in a language other than English. Would you accept the results?

It is clear that neither Nielsen nor Arbitron provide an accurate measurement of the Hispanic audience. Yet, under H.R. 5949, it is precisely the size of the audience that will determine the carriage of Spanish television by the cable systems.

The current language in H.R. 5949, Section 344, specifies that "The term 'share of viewing hours' means the estimated percentage of total hours broadcast by a television broadcasting station which are viewed in the county in either all television homes or in all noncable television homes, or both. For purposes of establishing the share of viewing hours on a countywide basis, nationwide survey information such as that provided annually in an independent, professional, countrywide audience survey shall be used."

In practical terms, Arbitron and Nielsen are the only two major ratings services that would meet this criteria and whose survey information stands to be accepted. Presently, the only alternative ratings service using a personal interview methodology to provide Spanish television audience estimates does not supply them on a county-by-county basis but on an ADI (Area of Dominant Influence) basis. Just for Spanish television to present its case on a county-by-county basis would require an expenditure of hundreds of thousands of dollars.

And there is a much more basic point in question in the definition of "share of viewing hours" currently in H.R. 5949. Commercial English language television aims at a mass audience. Their carriage by the cable systems is to be based on the share of the general audience reached by the station. In othe words, carriage is essentially based on the station's share of their target audience—the English speaking population. Were the same audience standards to be applied to Spanish television stations, their carriage would also be based on the station's share of their target audience—the Hispanic population. The share of the general audience reached by the Spanish stations bears little relationship to the demand that exists for the programming service in the relevant community, the Hispanic population.

The Spanish television stations' share of the Hispanic audience in the cities they currently serve ranges from 33 to 65 percent. Clearly, Spanish television is very successful in providing programming services and in attracting the audience it is intended to serve—the Hispanic population.

The crucial portions of H.R. 5949 with which we are concerned apply to cable systems with 36 channels or less; approximately 72 percent of the nearly 5,000 cable systems in the United States have less than 30, let alone 36 channels. Should H.R. 5949 be adopted as it stands and should Arbitron ratings data be used as the audience standard, Spanish television service could today be dropped by at least 79 cable systems in 35 counties. The prospects for carriage of new Spanish television signals or of existing Spanish stations by new cable systems would also be in jeopardy.

In the past few years, the FCC, at the direction of the Congress, has developed and implemented regulations such as tax certificate and distress sales policies that are designed to encourage the diversification of broadcast ownership and programming service as part of its mandate to serve the public interest. H.R. 5949 represents a divergence from this policy by directly limiting the availability of an unduplicated broadcast service designed to meet the particular programming needs and interests of 15 to 20 million American citizens.

We have attached amendment language to this testimony that addresses the application of audience standards for Spanish television. We respectfully request that both Committees consider the proposed amendment language.

The 15 to 20 million Hispanics in this country represent an integral and productive segment of American society. Spanish television provides a vital and unduplicated news, information and entertainment service to this audience. A better informed Hispanic citizenry is better equipped to fully participate in the American mainstream and to contribute to the economic, cultural and political life of this country.

Spanish television represents a positive and active force in working towards full Hispanic participation in the United States. The U.S. Congress should be counted among the first to encourage Spanish television in continuing to provide this service.

Thank you for the opportunity to speak before you.

PROPOSED AMENDMENTS OF SPANISH TELEVISION BROADCASTERS TO H.R. 5949

Deleted material in brackets, added material in italic.

SECTION 341

"(b) Except as provided in subsections (c), (d), and (e), the Commission shall require the carriage of television broadcasting stations (including television broadcasting translator stations) by cable television systems in accordance with its rules, regulations, and authorizations in effect on November 1, 1981, and shall not require the carriage of any other broadcasting station or—

"(1) any broadcasting station (A) which operates on a channel not listed in the table of allotments of the Commission [as of November 1, 1981;] or (B) which operates pursuant to an authorization by the Commission as a low power broadcasting facility;

"(2) any direct broadcast satellite service;

"(3) any station in the multipoint distribution service; or

"(4) any other radio communication service intended for direct reception by members of the public.

(c)(1) Any cable television system having 36 or fewer actived channels mayi elect not to carry any television broadcasting station whose signal does not receive—

(A) A 1 percent share of viewing hours in noncable television households *or in the case of television stations broadcasting principally in the Spanish language, a similar share of viewing hours in Spanish origin households as defined by the Bureau of the Census* in the county in which the cable system is located; or

(B) a 2 percent share of viewing hours in all television households *or in the case of television stations broadcasting principally in the Spanish language, a similar share of viewing hours in Spanish origin households as defined by the Bureau of the Census* in such county; except that such systems shall carry *at least one* noncommercial educational stations [and nonentertainment commercial stations] whose signals are *is* not viewed to the extent spoecified in this subsection in accordance with subsections (d), notwithstanding subsection (g)(1).

(d)(1)(A) Any cable television system having 36 or fewer actived channels shall be required to carry not more than 3 noncommercial educational stations (including stations whose signals receive at least the percentage shares specified in subsection (c)) in any community located, in whole or in part, within the grade B contour of such stations; *provided, however, that not more than one such noncommercial educational station shall be carried if a television station broadcasting principally in the Spanish language is entitled to be carried as provided in subsection (b) or (c) above and is not being carried by such system.*

(d)(1)(B) is deleted and (d)(1)(C) becomes (d)(1)(B).

(d)(1)(D) is deleted.

(e) is deleted.

"(f) Cable television systems which—

"(1) are required to carry a [Spanish language,] nonentertainment commercial station or a noncommercial educational television station pursuant to subsection (d); or

"(2) elect to carry one or more additional [nonentertainment commercial stations or] noncommercial educational television stations whose carriage would be required by the rules, regulations, and authorizations of the Commission in effect on November 1, 1981; may elect not to carry an equivalent number of network television stations which substantially duplicate the service provided by other signals being carried by the cable system pursuant to subsection (b). Such deletions of duplicating network stations shall be made in order of their distance from the cable system, beginning with the most distant.

"(g)(1) A cable television system shall carry any television broadcasting station required to be carried by subsection (b) and operating on the effective date of this section and any such station thereafter made operational—

"(A) if the station (other than a noncommercial educational station) is located not more than 35 miles from the cable system; and

"(B) until such station is subject to deletion under subsection (c), based upon publication of *a* viewing share reports (that are *is a* bona fide independent professional audience surveys which are *is* published annually and all of which were *was* conducted after such station began operation) for the market served by such station; except that, with respect to any cable television system having no vacant channel upon which to commence carriage as required by this section, the Commission shall authorize the deletion of a station required to be carried under this section and not otherwise deleted under this paragraph, or waive such carriage required by this section, such that the number of channels on the cable system devoted to the required carriage of television broadcasting stations is not increased. If carriage of a station pursuant to this subsection requires the deletion of a station which would otherwise be carried by the cable system and the station so carried may subsequently be deleted by operation of subsection (c), the cable system shall resume carriage of the broadcasting television station previously deleted under the exception in the preceding sentence.

SECTION 344

Redesignate (8) as (9) and insert as (8) the following:

(8) With respect to determinations concerning the carriage of Spanish language television stations, the term "principally" shall mean that the programming of such stations in the Spanish language constitutes at least two-thirds of that station's average weekly broadcast schedule.

Redesignate (9) as (10) and amend as follows:

(10) The term 'share of viewing hours' means the estimated percentage of total hours broadcast by a television broadcasting station which are viewed in the county in either all television homes or in all noncable television homes, or both. For purposes of establishing the share of viewing hours on a countywide basis, nationwide survey information such as that provided annually in an independent, professional, countywide audience survey shall be used. [and, in the case of surveys conducted for stations broadcasting principally in the Spanish language, surveys of Spanish origin households as defined by the Bureau of the Census shall be used to determine the share of viewing hours.] Share of viewing hours of stations which transmit both subscription and nonsubscription television programming shall be based only on the nonsubscription programming transmitted by such station.

Redesignate (10) as (11).

IMPACT OF H.R. 5949 ON SPANISH LANGUAGE TV STATIONS

	Systems with 36 or fewer channels within 35 miles	Systems carrying station	County of systems	Share of total HH (ARB) (percent)	Share of noncabled HH (ARB) (percent)	Drops pursuant to H.R. 5949	Station's share of Spanish viewing in ADI (SRC) (percent)
California:							
KMEX/Los Angeles	44	42				13	44
		29	Los Angeles	4	NC		
		6	Orange	1	NC	6	
		1	San Bernardino	NA	NA	1	
		6	Ventura	NA	NA	6	

IMPACT OF H.R. 5949 ON SPANISH LANGUAGE TV STATIONS—Continued

	Systems with 36 or fewer channels within 35 miles	Systems carrying station	County of systems	Share of total HH (ARB) (percent)	Share of noncabled HH (ARB) (percent)	Drops pursuant to H.R. 5949	Station's share of Spanish viewing in ADI (SRC) (percent)
KFTV/Fresno/Hanford	5	4				4	45
		1	Fresno	1	NC	1	
		1	Madera			1	
		1	Kings			1	
		1	Tulare	1	NC	1	
KDTV/San Francisco	41	34				13	51
		9	Alameda	1	1		
		11	San Mateo		1		
		8	Contra Costa	NA		8	
		1	Napa	NA	NA	1	
		1	San Francisco	1	1		
		2	Marin	NA	NA	2	
		1	Santa Clara E.			1	
		1	Solano W.	NA	NA	1	
KCSO/Modesto	31	31				13	52
		8	Stanislaus	1	1		
		5	San Joaquin	1	1		
		1	Calaveras	NA	NA	1	
		3	Amador	NA		3	
		5	Merced	NA	NA	5	
		1	Yolo	2			
		4	Solano	1	2		
		3	Placer W.	1		3	
		1	Contra Costa E.			1	
KCBA/Salinas [1]							
Florida: WLTV/Miami	11	11				6	65
		5	Dade	10			
		6	Broward	NA	NA	6	
Arizona: KTVW/Phoenix	3	3				3	60
		3	Maricopa		NC	3	
Texas:							
KWEX/San Antonio	4	4				2	46
		2	Bexar	7		2	
		1	Comal	NA		1	
		1	Guadalupe	NA		1	
KNBN/Dallas [2]							
KORO/Corpus Christi	11	11				2	43
		6	San Patricio	2			
		2	Aransas	1		2	
		2	Nueces	3	3		
		1	Kleberg	5			
Illinois: WCIU/Chicago	12	11				11	56
		1	Montgomery	NA	NA	1	
		6	Kane	NA	NA	6	
		1	Kendall	NA	NC	1	
		2	McHenry	NA	NA	2	

IMPACT OF H.R. 5949 ON SPANISH LANGUAGE TV STATIONS—Continued

	Systems with 36 or fewer channels within 35 miles	Systems carrying station	County of systems	Share of total HH (ARB) (percent)	Share of noncabled HH (ARB) (percent)	Drops pursuant to H.R. 5949	Station's share of Spanish viewing in ADI (SRC) (percent)
		1	Lake		NC	1	
New York/New Jersey:							
WXTV/Paterson	47	23				12	33
		3	Bergen	1	1		
		4	Hudson	2	NC		
		1	Passaic	2	2		
		2	Monmouth	NA	NC	2	
		1	Morris		NA	1	
		1	Somerset	NA	NC	1	
		2	Middlesex	NA	NC	2	
		2	Union	2	1		
		1	Orange	NA	NA	1	
		3	Westchester	1	NC	3	
		2	Rockland	NA	NA	2	
		1	New York	3	1		
WNJU/Linden-Newark [3]							

[1] No data available as station commenced operations Nov. 1, 1981, only one month before rating data was compiled.

[2] No data available. To become a full time Spanish language television station on or before Jan. 1, 1982.

[3] To be supplied.

Notes.—1. ARBITRON (ARB) data source is the "Arbitron County Circulatory Analysis" for 1981.

2. NA or "—" = Data not available either because the station could not be viewed in a specific county or data was below Arbitron's minimum reporting standards for inclusion in the coverage study.

3. NC = County was not cable controlled by Arbitron and, therefore, is not included in the report.

4. SRC data source is Strategy Research Corporation's "Spanish TV Audience Research" for the ADI's of Los Angeles (1982); Fresno (1982); San Francisco (1982); Modesto (1981); Miami (1982); Phoenix (1981); Chicago (1979); San Antonio (1981); Corpus Christi (1981); and New York (1982).

Chairman Packwood. Thank you.

Mr. Thompson.

Mr. Thompson. Mr. Chairman, I appreciate the opportunity to be here. I am representing both the Subscription Television Association of the 31 companies in the United States that operate in the subscription mode as well as subscription television here in Washington, Super TV, the local subscription television franchise.

The industry subscription television is opposed to certain provisions of this bill especially pertaining to the must-carry provision which would effectively lock out both STV service and the UHF broadcaster upon which that signal is carried from cable systems.

The impact of that, we feel, upon the public is to restrict the availability of choice that the consumer has to make free choice in purchasing our product or in viewing the free programing of the UHF broadcaster.

Once the must-carry provision is eliminated and an STV UHF broadcaster is locked out of the system, the over-the-air mechanism in the consumer's home is disabled. There is no way that the consumer can receive that over-the-air signal except by altering the installation of a cable system.

We have dealt with that in a practical manner. We have faced this problem numerous times where it is actually illegal for us to install a consumer who wants to purchase our product because we have to disconnect a cable system and become involved in their equipment to perform our installation. If UHF broadcasters are locked out from over-the-air, it restricts their ability to compete in the marketplace. If there is no way that they can gain access to these homes, then we think this is unfair.

What we were granting is a technological monopoly to cable if we are not able to gain access onto the cable systems into a cable home. It is a technological monopoly on top of the legal monopoly that the cable system is granted by the local franchise.

We have proposed an alternative to the must carry if that is going to be restricted or eliminated in this bill. And that is a mandatory switch which would give the consumers a choice. If they are installed onto a cable system, they would at least have to leave him with the freedom of choice; choose either to have his cable system or to have an over-the-air signal. Without that, once the cable system is in place, the consumer no longer has the choice to receive the free programing of certain UHF stations that carry an STV scrambled signal nor to receive the scrambled signal of a subscription television service.

Thank you.

[The statement follows:]

STATEMENT OF THOMAS C. THOMPSON, CHAIRMAN OF EXECUTIVE COMMITTEE, SUBSCRIPTION TELEVISION ASSOCIATION

Mr. Chairman, my name is Thomas C. Thompson. I am Chairman of the Executive Committee of the Subscription Television Association ("STVA") and President of Super TV of Greater Washington, a supplier of subscription television services. I am here today to testify against certain provisions in H.R. 5949, the Cable Copyright and Signal Carriage Act of 1982,[1] which will make it increasingly difficult to finance and operate the many UHF TV stations which are now "silent" across the country and otherwise deny viewers the benefit of pay TV services tailored to the viewing needs of their local communities. Specifically, I will be addressing those provisions in H.R. 5949 dealing with cable carriage of local television stations.

In my testimony today, I first will describe the subscription television industry and the role it plays in modern video entertainment services. I will review the public policy issues and spectrum allocation concerns which the Federal Communications Commission has sought to address through its subscription television rules. I then will describe the mischief which H.R. 5949 will create for our young industry by placing in the hands of STV's staunchest competitors the power to turn STV and conventional programming off the air to American television viewers. Finally, I will offer compromise language to what we feel are the more inequitable provisions in H.R. 5949, and urge your Committees to adopt, at a minimum, a "mandatory switch" requirement for all cable operators who exclude any local stations from carriage on their systems.

THE ROLE OF SUBSCRIPTION TELEVISION SERVICES IN MODERN TELECOMMUNICATIONS

Subscription Television Association is a Washington, D.C.-based trade association representing companies engaged in all aspects of subscription television and other over-the-air pay TV services. STVA's members include STV providers, the broadcast licensees whose stations transmit STV programming, other over-the-air television providers,[2] and the entertainment programmers and hardware suppliers which serve these industries. STVA was formed with the goals of promoting the growth and development of subscription television; representing the interests of companies providing these services before judicial, legislative, and administrative bodies of federal, state, and local governments; gathering and disseminating data relating to the subcription television industry; and establishing a high level of ethical standards for companies offering these services to the public.

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[1] Unless otherwise noted all references will be made to the September 24, 1982 Report by the House Committee on Energy and Commerce (Rept. 97-559).

[2] Subscription television, or STV, constitutes one segment of a group of modern telecommunications offerings known generally as "pay TV." Other pay TV services currently available to the public are offered by cable television over wireline facilities directly connected to the subscriber's television set, and by multipoint distribution services ("MDS"), wherein transmissions of high frequency signals are "downconverted" by appropriate equipment and displayed on a conventional television receiver. In the future, pay TV offerings may be transmitted by low power broadcast facilities or by satellite directly to subscribers' homes. Although their methods of delivery vary, each of the pay TV services represents an effort by the Federal Communications Commission ("FCC" or "Commission") to promote the public interest and convenience by making available sources of television programming alternative to the advertiser-sponsored television broadcasts now received by the general public.

The most distinguishing feature of STV is its ability to respond to the intense demands of small viewing audiences who are willing to pay for these services. STV is able to engage in "narrowcasting"—specialized programming of unedited entertainment, sports events, cultural, educational, and children's programming. Unlike conventional, advertiser-sponsored television, STV is capable of providing video services without the hidden costs and market anomalies inherent to the indirect financial structure of advertiser-supported broadcasting.

The first commercial STV station went on the air in Los Angeles in 1977. Today, only five years later, 31 STV stations are thriving in 22 major television markets throughout the country, placing a combined 35 million U.S. households under STV signals. Within the next two or three years 11 more oprations are expected to go on the air, and by the latter part of this decade as many as 67 STV stations may be operating across the United States, reaching nearly 45 million, or more than half of all households in America.

During STV's brief existence viewership has grown to 1.5 million households. Industry analyst now are predicting that by 1985 nearly 5 million American homes could be subscribing to STV services and generating approximately $1.2 billion in annual revenues for the industry. In addition, hundreds of millions of dollars will be earned and thousands of jobs created by the many American industries which serve and support STV operating including decoder, cable, and antenna manufacturing; installation and maintenance services; and video programming.

Management of an STV franchise requires substantial financial outlay and business experience. A typical STV business involves a franchisee who purchases broadcast time from a UHF or VHF licensee, obtains appealing programming from various sources, solicits subscribers through advertising or other promotional activities, and rents and maintains decoder equipment to the subscribing public. The franchisee encodes its signals by various means ("scrambling"), and realizes financial return solely from program rental payments made by authorized subscribers. STV decoders are installed by operators, typically by direct connection to a subscriber's television antenna terminals. Once a household has been connected to a local cable system, however, the subscriber's receiver is dismantled from its "off-the-air" capabilities and STV reception cannot take place without additional engineering at the customer's site.

The STV industry has grown and thrived in many markets where other forms of pay television already existed largely because of its unique technology and locally-oriented pay programming services. STV, which piggybacks on a VHF or UHF signal, is able to cover large geographic markets virtually instantaneously. Cable, on the other hand, takes years to build. STV operators who do most of their own programming have cable operators obtain their programming from national distributors who cannot tailor their video packages to meet specific community needs.

Under the FCC's "must carry" rules now in effect, local broadcasters are not penalized if they elect STV as a supplemental or alternative source of funding. While the scrambled portions of such programming are not reqired to be carried by local cable operators, the FCC's rules require all noin-scrambled portions to be carried. Local broadcasters, therefore, can enjoy the benefits of a large cable subscriber base during their non-scrambled hours and still appeal to a cable's captive audience for their own pay television services which often compete against cable operators' own pay programming.

COMMENTS ON H.R. 5949

STVA is deeply troubled by certain language in Title II of H.R. 5949 which would permit small cable operators to "turn off" a local station merely because some portion of its programming—even an insignificant portion—constitutes subscription television. Our Association is equally concerned over other language in the Bill which would allow cable operators of any size ot deny their subscribers access to local stations if more than 50 percent of the station's programming is scrambled. Because a cable-connected television set is incapable of receiving over-the-air broadcasts, H.R. 5949 will permit cable operators to "lock out" local stations and thereby create a strong disincentive for any broadcast licensee to elect subscription programming as a supplement to its advertiser-supported funding.

The question of cable "lock-out" is a critical one for our young industry, particularly in view of the fact that one of the truely unique features of STV is its ability to finance silent or marginally profitable UHF stations. Because STV derives financial support from direct payments by subscribers rather than advertising revenues, UHF stations which otherwise would have great difficulty competing for scarce advertising dollars are made viable through the use of STV. An added benefit of STV-generated funding is that during the non-scrambled viewing hours, STV communities also can receive conventional programming that might otherwise not exist.

As the FCC noted recently in its Rule Making on PBS entry into STV, 65 percent of all allocated UHF channels across the nation are currently silent. Notwithstanding the widespread recognition of this nagging problem, the FCC has taken little action outside of its STV rule makings to stimulate this grossly underutilized portion of the frequency spectrum. Recently, for example, the FCC eliminated its "Complement of Four" rule to permit STV services to be offered in dozens of new markets around the country and also removed its 28-Hour rule to give broadcasters greater flexibility in their STV scheduling. Ours is an industry whose fate is coupled to our underlying UHF licensees. We urge you not to repudiate these recent FCC efforts to promote the future growth and development of the UHF spectrum through more liberal STV policies.

An additional concern of our industry is that the authors of H.R. 5949 somehow view STV as lifting from the shoulders of the underlying licensees all public interest programming obligations and responsibilities. This simply is not the case. In the House Report accompanying H.R. 5949, for instance, the authors made clear that the legislative predicate for the mandatory carriage rules is the assurance that the needs and interest of local communities would be met by "carried" broadcasters. Exceptions to mandatory carriage, particularly those involving STV broadcasters, therefore, are premised on the apparent belief that local needs and interests are not served by STV stations. Here, STVA strongly disagrees with this Report's authors and so does the FCC.

In its Third Report and Order in Docket 21502 (STV Rules), the FCC carefully weighted the pros and cons of its decision to lift the so-called 28 hour programming rule, which some critics contended would deny local programming opportunities to substantial segments of the viewing public. In Paragraph 33 of the Third Report, however, the FCC concluded that:

> An STV licensee will be expected to continue to meet its obligation to program in response to community needs. No reasons were offered by commentors or evident to us to indicate that STV and conventional licensees should have different obligations in this area . . . therefore, we will allow an STV broadcaster to meet his program responsibilities with either scrambled or conventional programming.

In short, the Commission's policy statement means that broadcast licensees have an obligation to serve local needs and interests and the Commission is unconcerned whether they decide to meet these responsibilities in a scramble or non-scrambled transmission format. For Congress to ignore this important policy consideration in its mandatory carriage rules will only invite unfair discrimination of local broadcast licensees who elect a for-pay alternative to conventional advertiser-supported funding.

A further point along this line also needs to be made. As presently drafted, Section 341(c) of H.R. 5949 exempts from its mandatory carriage provisions any TV broadcasting station whose share of viewing households in a given community does not rise to certain minimum levels. In defining "share of viewing hours," Section 344(9) of the Bill specifically excludes transmission time of STV programming. Because this definition appears to be based also on the same faulty predicate that STV stations do not have obligations to meet local needs and interests, we strongly urge that H.R. 5949 be amended to remove this "STV penalty" from small broadcast stations.

One final point which I would like to address is the anti-competitive effect which this legislation would have on subscription television. Once cable is introduced into a community, it becomes a "bottleneck" delivery system for all programming. Like the railroad terminal cases of decades ago, cable operators have monopoly control over all video commerce on their systems. Without some watchdog agency in control, these operators may be tempted to take unfair advantage of their market position. Because H.R. 5949 will permit cable operators to foreclose their systems to local STV stations during scrambled as well as well as unscrambled broadcasting hours, cable viewers, whose dismantled TV sets cannot receive any over-the-air transmissions, stand to be denied the important conventional and pay video alternatives provided by STV stations.

STVA feels it is essential that Congress establish a clear, equitable policy on the treatment of broadcasters who are excluded from the mandatory carriage provisions of H.R. 5949. We submit that there is only one fair means of giving off-cable broadcasters parity with those carried on cable and that is to require cable operators to install at the cable customer's option an A/B switch. Our Association and others refer to this concept as the "mandatory switch" alternative to must-carry and we strongly recommend that a new subparagraph be added to Section 344 of H.R. 5949 as follows:

> (h) Any cable television system which elects not to carry one or more television broadcasting stations pursuant to any of the subsections in this paragraph, shall provide viewers on its system with the option of receiving over-the-air transmissions by such stations by means of a switching arrangement which is not materially more difficult to operate than the channel selector equipment provided to viewers by the cable television operator.
>
> (i) The Commission shall prescribe such rules and regulations as are reasonable and necessary to carry out the provisions of this section.

On behalf of the Subscription Television Association, I urge you and the other members of your Committees to amend the mandatory carriage provisions in H.R. 5949 as I have outlined, and to adopt the "mandatory switch" language set forth in my prepared text, to serve the interests of the pay TV viewing public everywhere. Thank you for this opportunity to appear before your Committees and I would welcome questions which you might have.

Chairman PACKWOOD. Each of you, and I think justifiably for your own interest, quarreled with the must-carry provisions in the bill. I do not know if there were other groups that in addition may have that same complaint. Would you be willing to accept a bill that had no must-carry provisions in it at all, you or anybody?

Mr. HUTCHESON. Speaking for low-power, Mr. Chairman, certainly. At least that would give us a chance to compete on an equal basis for those channels, which we do not have now.

Mr. HUBBARD. And speaking for our company, USSB, yes, sir, as long as we are all treated the same.

Mr. GUERNICA. We are in agreement with that, yes.

Mr. THOMPSON. Speaking for the Subscription Television Association, we do have one problem with that, in that we are not unscrambled over the air—we install a special set of equipment and that is incompatible with the cable system's equipment. So without either carriage on the cable system or provision for a switching device in the consumer's home, we would be effectively locked out of installing. We could not otherwise compete. We cannot compete over the air.

Chairman PACKWOOD. But what I am saying, you can contract with them and they can carry you. You can put whatever kind of a switch in you want. The law would simply say they do not have to carry you or anybody else that they do not choose to carry. If you can convince them to carry, you can contract with them and put the switch in; that is your business and their business.

Mr. THOMPSON. I think we would be generally in agreement with that.

Chairman PACKWOOD. Senator Thurmond.

Chairman THURMOND. I do not think I have any questions. I have listened very attentively. I wish to express my appreciation to you gentlemen for appearing here and giving us the benefit of your views. That will be very helpful to us as we consider this matter.

Chairman PACKWOOD. Senator Pressler.

Senator PRESSLER. Yes, I have a few questions and some more for the record.

First of all, it has been my observation, since serving in Congress for the last 8 years that each new technology is blocked out by the existing technologies, or at least tries to. I remember when I first came around, the broadcasters were trying to slow the cable people down, and now the cable people are in, and they and the broadcasters look with a dim view on some of the new technologies or some of the more exotic ones.

On the other hand, we cannot upset the whole applecart unless there are very good reasons. But I am particularly concerned about the public interest, and it seems to me that this DBS system will help certain people out there with a satellite receiver who are out on a ranch or someplace or the man on the street, so to speak, who is not a member of any group.

But anyway, let me ask a few questions of Mr. Hubbard. First of all, in what ways will your proposed DBS system, U.S. Satellite Broadcasting Co., be similar to the three major networks? In other words, how exactly can USSB be characterized as another potential national network?

Mr. HUBBARD. Well, Senator, No. 1, we will be similar to the other existing networks if we are successful, in that we will provide free over-the-air advertiser-supported service. We will also ask television stations to join with us to tie local service into our national program. We think this is a very important concept.

We think there is a great deal of talent and a great deal of thinking and ideas across this country that never do have a chance to be exposed because of the fact that the structure, not through any evil design of anybody, but because the structure only makes possible three networks. We think there is a chance for four or five or six commercial networks to survive very successfully.

In that regard, we will be the same as the other networks. We will be different in that we will be able to reach the 5 million or so people who, according to the FCC now, do not have adequate television service. And there is only one way they can be reached, and that is through the development of DBS. They cannot be reached by cable because you cannot wire South Dakota. It would be pretty difficult to put the wire between those great ranches which are 10 miles apart. So we offer, we think, the solution.

Senator PRESSLER. Let me ask you this. The majority of the direct broadcast satellite systems recently authorized by the FCC are proposing pay programing services. H.R. 5949 clearly excludes must-carry protection for any paid service. Would you please explain the major differences between the Hubbard DBS proposal, your proposal, and other DBS applications, since this is an important distinction within the legislation?

Mr. HUBBARD. Senator, our company is talking about free over-the-air advertiser-supported service. And to the extent that we or anybody else is a pay service, we do not think that we have any right asking cable systems to carry that pay service because we would be competing directly with their services, many of which are pay services. And I do not think that is right.

So we do not think anybody has a rightful claim to say, you have to carry us to compete with you. We are not a pay service, and we would not do that if we were. We do not think that other DBS services who are not going to be pay have a right to say that. We think that free over-the-air broadcasting, however, ought to be treated alike, whether it comes from satellite, whether it comes from low-power television station, or whether it comes from Stanley Hubbard's television stations.

Senator **Pressler**. Then following that, the bill H.R. 5949 prohibits a number of broadcast services from must-carry protection. Why should free DBS be included and not other services such as low-power television? And you have addressed that to some extent already.

Mr. **Hubbard**. I think that to the extent that the low-power television is receivable over the air, they ought to be treated like other services that are receivable in a home over the air. I think, in other words, that if a low-power television station were to be established in Minneapolis-St. Paul—and we have done engineering studies—it would cover approximately the core city of Minneapolis-St. Paul if it were up on our IDS tower, which is the biggest building in Minnesota.

We think to the extent that it reaches those people, it should be carried on cable. We think, however, that cable systems ought not to be obligated and required to carry signals which they do not receive over the air at the head end of the cable. That is the difference.

If it is receivable in the viewer's home, we think that it ought to have equal treatment. We think that it ought not to be required to be imported, whether it is imported 20 miles or 100 miles. We do not think it is fair to ask for a required importation.

Senator **Pressler**. Incidentally, when I finish this series of questions, and I just have a couple more, if any other panel members want to comment on them, make a note and say so. But following that, the original arguments in favor of must-carry rules were based on the need to protect local broadcasters and local programing. Opponents of DBS argue that this new service is national and not local in nature. How do you envisage your DBS network as local and justifying must-carry protection?

Mr. **Hubbard**. Well, our DBS system would not be local in the sense that a local station is local, Senator. It would be local in the sense that we would be a broadcast station from the sky as compared, for example, to a network which is dealing with affiliated stations. We would intend, for example, to broadcast emergency weather warnings. We would say that what happened in Illinois, had you been watching our DBS station, you would have known what was coming before it came. We intend, to that degree, to be a local station with news bulletins and things like that.

But we are not local. I would say, as a broadcaster, that 80 percent plus of our broadcast day is not comprised of local programing. It is comprised of network-originated programing or syndicated programing which we buy from elsewhere. And I would say that if the must-carry rules were going to be limited exclusively to must-carry local programing, I have no problem with that.

If they say the cable system must carry that portion of the broadcast day which is locally originated—news, weather, sports, public affairs, whatever—then no problem. But what they are saying now is that they must carry, the cables must carry, the programing that is brought to local stations by the national networks and not carry our programing. We think that is not fair, Senator.

Senator **Pressler**. OK. But many cable systems have 20 or fewer channels. The cable industry argues that this is reason enough for the narrow range of broadcast services, included under must-carry. How do you counter that argument?

Mr. **Hubbard**. Well, if, for example, cable systems were required to carry one channel, a free over-the-air advertiser-supported channel from each of the DBS systems, that would only total eight channels, and not all eight DBS systems propose to be broadcasters. It is only about three or four of them that do.

So I can only see three or four additional channels, and it would seem to me that it is more important to carry free over-the-air broadcasting on cable than it is to carry, for example, Mr. Turner's WBTS which is not licensed by the FCC to broadcast to South Dakota or to broadcast to Minnesota or to broadcast to North Carolina.

We will be licensed by the FCC to serve those areas, and we ought to be treated the same as anybody else who is licensed to serve those areas. Does that answer the question, Senator?

Senator **Pressler**. Yes, it does, but I am just about out of time. I have one more question. You might elaborate on that a little bit more for the record if the Chairman will allow.

My last question is that the supporters of the bill maintain that any free DBS system service affiliated with over-the-air stations will automatically be carried by the must-carry requirements, if the stations meet the percentage standards in the bill. Could you comment on that assumption?

Mr. **Hubbard**. Yes. That is partly true. To the extent that a direct broadcast satellite system is associated with a local station and the local station has carriage on the cable, then the direct broadcast satellite system will be entitled to the rules.

But remember, the system was authorized to broadcast directly to the homes, and although it is to our benefit and, we think, to the local station's benefit to work together to provide a new service, we are also providing service directly to the homes of every person in America. And we think they should be entitled to receive that licensed service just as well as they have the opportunity to receive the licensed service of other television stations.

Does that make that clear? It is a complicated question, Senator. We have not been invited to the party. We just received our license on November 4, and I think it takes some time for people to really understand what this new national service which has been authorized on behalf of the benefit of all the people is going to mean. I can't do it here in a few minutes, but I appreciate the time that I have had.

Senator **Pressler**. To the man on the street or the man on the remote ranch, it sounds very good.

Mr. **Hubbard**. Thank you, sir. We think so.

Chairman **Packwood**. Any more, Larry?

Senator **Pressler**. No, thank you. I thank the Chairman for giving me some extra time there.

Chairman **Packwood**. Senator Thurmond, any questions?

Chairman **Thurmond**. No questions.

Chairman **Packwood**. Gentlemen, thank you. You have been very patient waiting this morning. We appreciate it.

We will conclude with panel 4, Mr. Dolan, Mr. Leghorn, Mr. Serrao, Mr. Martin, and Mr. MacLeod. Mr. Dolan, go ahead.

STATEMENTS OF CHARLES F. DOLAN, CHAIRMAN, CABLEVISION SYSTEMS; RICHARD S. LEGHORN, PRESIDENT, LEGHORN TELEPUBLISHING CORP.; JOHN A. SERRAO, PEYTON BROADCASTING, LTD.; PETER MARTIN, VICE PRESIDENT, MANSFIELD TELEVISION; AND RODERICK H. MACLEOD, PRESIDENT, COMMONWEALTH CABLEVISION OF MASSACHUSETTS, INC.

Mr. **Dolan**. Good afternoon, Mr. Chairman. I am Charles Dolan, chairman of Cablevision Systems Corp. We own and operate cable television systems in the New York and Chicago metropolitan areas, and we are currently starting a new cable television system in the city of Boston.

Today, Cablevision serves approximately 275,000 subscribers in the New York and Chicago markets. It is important to note about Cablevision that we are in no other business, particularly, we are not involved in broadcasting. Our primary concern is providing the best possible cable television service to our subscribers. Accordingly, Cablevision is opposed to the passage of H.R. 5949.

Our position is different from that of the National Cable Television Association, of which we are a member. The passage of this bill would have a significantly adverse effect on cable homes in urban areas like New York, Chicago, and Boston. Hence, restrictions would be imposed on cable by the large number of broadcast stations operating in these markets. In the New York area alone, as you may know, there are 15 television broadcast stations operating today. If H.R. 5949 is passed, these broadcast stations will be able to deny our subscribers the flexibility and diversity of program choice that they now enjoy.

The cable television industry today serves 25 million homes. By the end of this decade we expect to be serving 50 million homes. For these homes the attractive promise of cable is the vast choice of programing that we are able to offer through our multichannel facilities. At any hour that he is able to watch, the cable subscriber is able to sort through an unprecedented number of channels to find the program selection that best matches his personal interest.

Broadcast television has never been able to provide this environment of choice. The subscriber is eager for the improvement that cable brings, and he is willing to pay for it. However, cable cannot deliver on this promise of diversity unless it has access to the extensive pool of copyrighted works that are currently in syndication.

We cannot ourselves license these as we would like to because just about every syndicated feature film or television series of any merit is already licensed to the broadcasters. The only access we are able to give cable homes to syndicated properties is through distant signals.

We bring in as many out of town stations as we can physically obtain. For New York and New Jersey subscribers, we import stations from Philadelphia, Boston, Hartford, Worcester, Buffalo, Scranton, Allentown, Atlanta, and Chicago.

Last night, to give one small example, our New York/New Jersey subscribers were able to watch Robert Redford in "Downhill Racer" playing on WSBK in Boston. For many, I am sure this film was an important addition to the choice offered by cable last evening.

If H.R. 5949 were now in effect, they would have been denied the opportunity to see "Downhill Racer" because it is already licensed and on the shelf of 1 of the 15 television broadcasters in the New York market.

Cablevision might wish to license "Downhill Racer" itself. Then we could show it without commercials. But we serve less than 4 percent of the homes in the New York market, and we cannot compete with broadcast stations that have Federal licenses to serve 100 percent of the market. In their arrangements with the distributors, the broadcasters insist on and get exclusivity not only against other broadcast stations, but also against all cable systems operating in the market.

Through industry practice, the broadcasters are able to deny cable the opportunity to license copyrighted works in syndication. Through the syndicated exclusivity provisions of H.R. 5949, the broadcasters would once again deny cable the opportunity to obtain these programs by the only means remaining; the compulsory license provisions of the distant signal rules. I believe every cable operator who is not also a broadcaster or distributor must be urging you not to reinstate that privilege control of copyright for the broadcaster.

The FCC in 1980, after extensive study and review, repealed the syndicated exclusivity and distant signal importation rules, a decision upheld by the Second Circuit of the U.S. Court of Appeals. The effect of H.R. 5949 would be, in essence, to reimpose those rules.

Before determining to repeal the exclusivity rules, the FCC engaged in a 3-year process described by the Second Court of Appeals as comprehensive. They completed two major staff studies, examined several broadcast and production industry studies, and then secured the analysis of independent experts.

The conclusion, "There was absolutely no reason to retain the rules. The FCC stated that those rules occasioned significant sacrifices in consumer welfare, and were not only unnecessary but counterproductive."

Variety of programing is quickly becoming the hallmark of American television. Without providing significant benefits to either program producers or to broadcasters, the act will decrease consumer choice and narrow that diversity.

Thank you for the opportunity to express our views.

Chairman THURMOND [presiding]. Mr. Leghorn?

Mr. LEGHORN. Thank you, Mr. Chairman. I am testifying today, Mr. Chairman, as an independent cable operator, although I am a member of the board of the National Cable Television Association, and have been for many years a member of its public policy committee.

I would stress that my testimony is distinctly contrary to the position of NCTA. In fact, it may be 180 degrees contrary. But it is my contention that these views not only reflect the broad public interest in cable copyright legislation, but also reflect long-term interests of the cable industry.

My testimony has two purposes. One, to suggest that you emphatically reject H.R. 5949, and the second is that next year, you hold hearings on an attractive alternative proposal based on "reception consent" of advertising-supported television, elimination of the compulsory license and elimination of all the signal carriage rules embedded in this bill.

Granted that this bill is a triumph of compromise of the three principal industries contending economically here. But it is a disaster in terms of the public interest. The public interest, as represented by the consumers' interest, will be dealt with I think by other members of this panel, particularly Mr. MacLeod, who will describe to you the Swiss cheese effect of the rules on the programing presented to the cable subscribers.

But also of particular concern to me is the way the bill flouts the Constitution, especially the first and fifth amendments. I am a great admirer of Senator Packwood for his efforts to extend the protections and the role of the first amendment in our society to electronic media, but I would point out that this bill if enacted would undercut those efforts.

For example, the must-carry rules, in effect, impose common carrier status in part on cable operators. That would seem to be a taking within the meaning of the fifth amendment, but in particular, it has significance for the first amendment. If cable is, in fact, a publisher, this would mean a taking of the assets of a publisher by government for a public purpose.

It is hard to contemplate a bill lasting 10 minutes in this chamber that proposed to take 10 or 20 percent of the pages of a newspaper and have them devoted to mandatory carriage of this set of printed materials or that set of printed materials or something else. And yet, that is exactly what the mandated signal carriage rules do.

In terms of the free market, this bill proposes a regulatory thicket that is almost unprecedented in legislation. You have the syndicated exclusivity rules, the network nonduplication rules, the must-carry rules, and so forth. And the economic reasons advanced for all these intrusions by Government in the free marketplace are either obsolete or have been discredited thoroughly by Government studies, or they are based on assumptions that have been unchallenged.

These matters are dealt with at length, sir, in my submitted testimony. I would like to deal only with one issue. I might remind you of the marketplace that we are concerned with, which is the marketplace for ad-supported television. There are three pathways through this marketplace today.

First is the direct broadcast pathway. You will note on the charts that the programing passes from the broadcast transmitter to the home antenna, and to the viewer. That channel is completely free from all Government economic interference.

The second channel is the one loaded with this regulatory morass. Here programing goes from the broadcast transmitter to a community antenna, and thence to the viewer.

The third pathway is also completely free of all economic interference. The effect of all the regulations in the middle channel is to throw programing into the other two channels. If I could have the last chart, please.

Briefly, sir, the market mechanism whereby this works is that the middleman, the broadcaster and cable network operator, attracts audiences and measures those audiences or estimates them. And that is the basis for money transfers between the advertiser and the copyright holder.

When the bill was passed—the copyright bill was enacted in 1976—that mechanism was imperfect. Congress, in my view, properly intervened with the compulsory license to deal with the matter.

Today, the technology of audience measurement is sufficiently good in many markets and will soon be throughout the Nation, that this Government intervention is no longer necessary, and the compulsory license can be sunsetted.

The attachment to my testimony by Robert Schultz, who is a preeminent researcher in the field, bears out this statement.

In summary, I would urge that next year you give attention to the notion of "Reception Consent" for all ad-supported television. This will permit the complete elimination of the compulsory license and the signal carriage rules. Thank you, sir.

[The statement follows:]

STATEMENT OF RICHARD S. LEGHORN, PRESIDENT, LEGHORN TELEPUBLISHING CORP.

My name is Richard S. Leghorn, Cape Cod, Massachusetts. I have been involved with the construction and operation of cable systems in Massachusetts and other states since 1966, have headed corporations engaged in the manufacture of aerospace, communications and high-technology systems and equipment, and have been a member of various advisory groups to the Defense, State and Commerce Departments and the White House, concerned with public policy involving defense, disarmament and economic issues.

Although I testify today as a troubled citizen and independent cable television operator, for several years I have served as a director of the National Cable Television Association and a member of its Public Policy and predecessor Committees. I would stress, however, that the views expressed in this testimony are distinctly contrary to the position of NCTA—in fact, they may be 180 degrees contrary. But it is my contention that these views not only reflect the broad public interest in cable copyright legislation, but also reflect the long-term interests of the cable industry.

I. SUMMARY

The purpose of my testimony today is to suggest that your Committees not endorse HR 5949, the Cable Copyright Amendment recently passed by the House, and that you schedule hearings on an alternative approach based on elimination of the Compulsory Cable License, on elimination of all signal carriage rules and adoption of the concept of Reception Consent in advertiser-supported television.

Granted that the Bill is a triumph of statesmanlike compromise among most of the contending industries. Granted that kudos of a sort are due to the three industries who achieved this delicate accommodation of fiercely competing economic interests: cable television, broadcast television and the movie industry.

But the Bill is a disaster in terms of consumer interests, in terms of the broad public interest in free markets and in terms of the national interest in preserving and enhancing constitutional values. The Bill actually flouts the Constitution, particularly the First and Fifth Amendments. And it flouts the public interest in free markets by increasing already unwarranted government intrusions into the marketplace for electronic entertainment, of all things.

Second, the economic reasons advanced for the dense, complex regulatory thicket imbedded in the Bill are either obsolete, discredited, or based on faulty and unchallenged assumptions. Government intrusion in 1976, when the present Copyright

Law was enacted, was rational because of the then imperfectly functioning marketplace; but the marketplace can now function more than adequately, as I will elucidate, and the Compulsory License can be given the "sunset" treatment.

A further rationale for the regulatory thicket—economic harm to television broadcasting—has been thoroughly discredited by intensive studies in an F.C.C. Inquiry, an F.C.C. Rulemaking and subsequent Court review.[1]

Another rationale for the thicket—the need for government to protect localism in television broadcasting—is based on faulty assumptions and disregard of the First Amendment. The rules in HR 5949 would establish in law a localism which consumers could vote for with their viewership if only a robust competition confronted local broadcasters.

Perhaps the most ludicrous rationale for the regulatory thicket is that the commercial networks somehow deserve protected access to a consumer's TV set; how absurd that government should intervene to help the oft-lamented "vast wasteland" of lowest-common-denominator network entertainment ordained by the technology and economics of advertiser-supported television.

Finally, you should not approve HR 5949 because an attractive alternative is available, one not considered in the House, although some members spoke energetically in support of parts of this approach. It involves:

(1) repeal of the compulsory cable copyright license in Section 111 of the 1976 Act;

(2) retention in Copyright Law of provisions to prevent deletion or substitution of video programs or commercials without the consent of the broadcaster or channel programmer;

(3) rejection of all signal carriage rules; and

(4) adoption of a simple rule of "Reception Consent" in Communication Law to establish a single free marketplace for all advertiser-supported television.

II. H.R. 5949 FAILS TO TAKE ACCOUNT OF CONSUMER INTERESTS

The Bill makes Swiss cheese of the cable programming presented to the consumer. After years of hearings and studies, the Bill would re-impose the syndicated exclusivity rules that were eliminated years ago by the F.C.C., a decision upheld by the Courts.[2] Now, with hardly a reference to the F.C.C.'s work, it is proposed that Congress sweep aside this deregulatory achievement and reintroduce an outrageous affront to consumer interests.

Rather than elaborate on this consumer injustice, I need only refer to a recent action in western Massachusetts. Commonwealth Cablevision, from 6 p.m. to 8 p.m. September 30th, simulated the effect of the syndicated exclusivity provisions of the Bill, which would excise an estimated one-third of the viewers' programming on five channels in a most haphazard fashion. Subscribers were so incensed by this demonstration of the effects fo the Bill that they inundated Senator Kennedy's office with protests.

Roderick A. MacLeod, president of Commonwealth Cablevision, is scheduled to testify today in elaboration of his eloquent pro-consumer statement on September 30. His testimony will, I believe, convince you that to pass the Bill as it now stands would be an unjustifiable failure to take into account consumer interests.

III. THE CONSTITUTIONAL FLAWS

The so-called "must carry" rules imbedded in the Bill impose on cable operators the burden of becoming a public carrier, whether or not they would like to function as such a carrier. These provisions would clearly seem to be a "taking" without due process within the meaning of the Fifth Amendment. Government is not authorized by the Constitution in effect to deprive a person of the private use of his assets by mandating that he use them for public purposes. I would urge that you carefully evaluate the manner in which the Bill ignores the Fifth Amendment.

Furthermore, the constitutional right of persons to equal protection of the law is violated by the Bill. Viewers who directly receive openly transmitted television programming are treated quite differently from those who receive such openly transmitted programs with the aid of a common antenna, sometimes extended in reach with carrier facilities. And city dwellers are greatly favored over country dwellers in their reception of programs broadcast openly into the air space over a public resource—the electromagnetic spectrum.

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[1] See, e.g. Report and Order in Docket Nos. 20988 and 21284, 79 FCC 2d 663 (1980), aff'd sub nom. Malrite TV of New York, Inc. v. FCC, 652 F.2d 1140 (2d Cir. 1981), cert. denied, 102 S. Ct. 1002 (1982); Notice of Proposed Rulemaking in Dockets 20988 and 21284, 71 FCC 2d 1004 (1979); Report in Docket 20988, 71 FCC 2d (1979); Report in Docket 21284, 71 FCC 2d 532 (1979); Notice of Inquiry in Docket 21284, 65 FCC 2d 9 (1977); Notice of Inquiry in Docket 20988, 61 FCC 2d 746 (1976).

[2] *See Report and Order in Docket Nos. 20988 and 21284*, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York, Inc. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

Most alarming of constitutional flaws is the damage to First Amendment values which the Bill would inflict on the nation, given the centrality of the First Amendment in our democracy and the growing dominance of electronic media. For the private assets which Government here proposes to seize and force into duty as a public carrier are the assets of a publisher.

Government can and should "separate" a monopoly carrier from dealing with content, but cannot be permitted to "separate" a publisher from control of the conduit which he may choose for the dissemination of his video or other expression, whether he exercises this control through ownership or contract. "Separations" is a concept applicable to carrier legislation, but legislation can separate a publisher from even partial control of his conduit only in total disregard of the imperative of the First Amendment.

Public carriers, whether mail carriers or telecommunications carriers, may not alter in any way the content of the information they carry, but must carry messages unaltered and indifferently. On the other hand, a publisher's function is to select, edit and manage the distribution of content. Public carriage is the very antithesis of publishing.

A cable operator is a member of the electronic media, a multi-channel video distributor, a telepublisher. He gathers, editorially selects, assembles and distributes to subscribers via coaxial cable along public ways (much as newspapers are distributed over public ways using automotive means), a multi-channel video publication organized appropriately for subscribers from an exploding assortment of video sources. These video sources include open television broadcasts over the public spectrum, basic and pay cable channels, and electronic materials soon to become available on demand from electronic "warehouses," including data bases, movies, specialty and educational programs, game and computer programs and more. In an Information Age, consumers badly need editors to help them select what they want from an overabundance of electronically available entertainment and information.

For government to intervene—as proposed in this Bill—between video publishers and viewers in behalf of the economic interests of certain entertainment industries threatens First Amendment values in an alarming way.

In 1980 Cape Code Cablevision Corporation, which I organized in 1966 and owned until earlier this year, initiated litigation in Massachusetts against the Commonwealth for unwarranted First Amendment intrusions upon the rights and ability of Cape Cod Cablevision to freely assemble and distribute its multi-channel video fare. Although I believe the cause of this action is formidable, if HR 5949 were to pass in its present form, an even stronger cause of action against the Federal Government would exist for unwarranted interference with First Amendment rights of both video telepublishers and viewers.

First Amendment challenges to municipal and state laws regulating cable's video publishing activities are now sprouting all over the country.[3] If HR 5949 were passed as now drafted, there would be an acceleration of such challenges to abridgement by government of the free flow of video expression between publishers and viewers.

Another First Amendment aspect. Senator Packwood is laudably engaged in a substantial effort to rearticulate the First Amendment so that electronic media are encompassed with clarity. For the Senate to pass this Bill, which is so harmful to the First Amendment rights of electronic media, before even taking up Senator Packwood's proposal, would be damaging to his initiative, and would be an unfortunate setback to his heroic purpose to strengthen the role of the First Amendment in our society.

In short, the Bill so shreds the Constitution as to warrant your conclusion that it is fatally flawed.

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[3] *See, e.g., Home Box Office, Inc. v. Wilkinson,* Civ. No. C-81-0331J (C.D. Utah, January 12, 1982) (permanent injunction issued against enforcement of law prohibiting cable carriage of indecent material under any circumstances); *Mountain States Legal Foundation v. City of Denver,* Civil Action No. 62-1738 (D.Colo., filed October 18, 1982) (complaint filed alleging that Denver franchise agreement containing specific service requirements violates the First Amendment.

IV. THE AD-SUPPORTED TV MARKETPLACE—PART FREE AND PART CLOGGED

Two distribution pathways in the marketplace of ad-supported television are free from economic interference by government. H.R. 5949 would choke the third pathway with a thicket of unwarranted cable copyright and signal carriage rules even denser than now exist, and for unsupportable reasons. As a further gross insult to free markets, the Copyright Tribunal recently increased government mandated royalties up to 800 percent and even 1,600 percent, thus completely choking off this distribution channel for many programs.

Chart A illustrates these three principal pathways through the ad-supported television marketplace. along the first pathway—direct broadcast—programs are transmitted directly over public airways to a viewer's home antenna. Along the second—and indirect broadcast—a video program is transmitted first over-the-air and then over cable to the viewer's TV set. The third ad-supported television pathway—basic cable networks—sees video programs transmitted over a satellite link and then cable to a viewer's TV set. It is the middle pathway—indirect broadcast—which certain provisions of the Compulsory Cable License, recently multiplied by the Copyright Tribunal, would clog, or choke completely in many instances.

The regulatory thicket clogging and choking the middle pathway favors the first and third pathways. Clearly, channel programmers of cable networks are strongly favored over independent broadcast stations by the Compulsory License as now interpreted by the Tribunal. And, with the possible exception of stations especially strong in regional sports, large independent stations, such as so-called superstations with a national reach, will tend to be favored over regional independents as cable operators cut back on their carriage of broadcast signals to avoid the financially crippling new copyright fees. Furthermore, the Bill would give network affiliates in "saturated" markets a major advantage over independents. Lastly, copyright owners are favored over everybody because they get paid twice for the same ticket—once by the broadcaster and again by the cable operator (through the Tribunal).

CHART A

THE THREE PRINCIPAL VIDEO PATHWAYS FOR AD-SUPPORTED TV

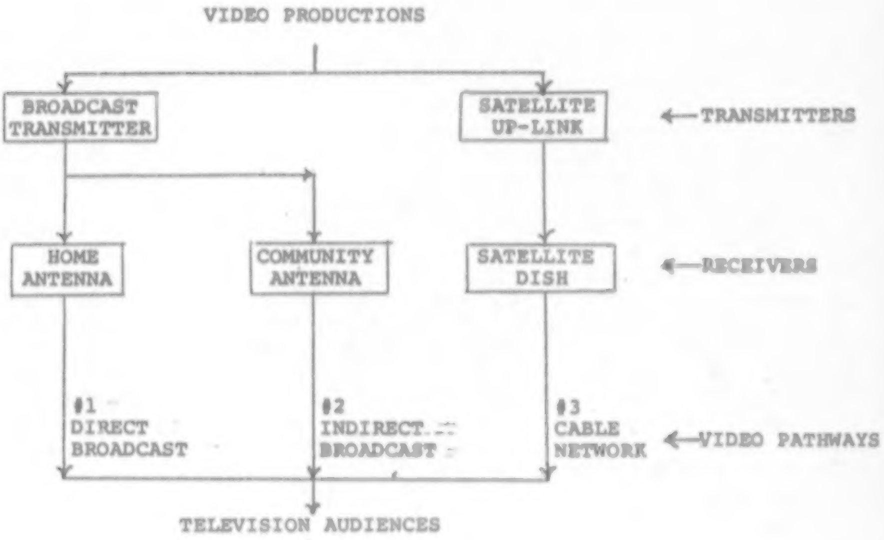
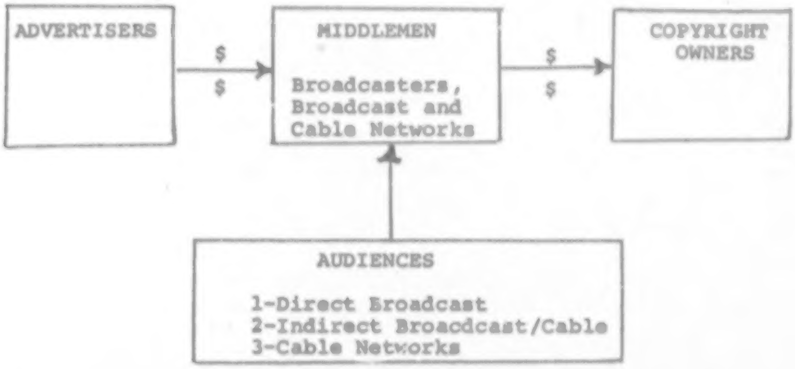


CHART B

THE MARKETPLACE FOR AD-SUPPORTED TV



Market Mechanism: Middlemen acquire or produce programs, with which they aggregate measured and estimated audiences as the basis for market negotiations to determine payments to copyright owners.

For what purpose is all this government meddling in what can and should be a free marketplace for ad-supported video entertainment? Certainly no longer to protect the property rights of copyright holders. Consider Chart B, which illustrates the market mechanism of the ad-supported marketplace. Dollars flow from advertisers to copyright owners through middlemen, who program television channels to attract as large audiences as they can. Measurements and estimates of these audiences constitute the market mechanism for determining how much is paid to copyright owners by advertisers for access to viewers.

In formulating the 1976 Act, local cable audiences were assumed to be proportionate to direct off-air audiences, but distant cable audiences could not be efficiently measured or estimated. Congress stepped into the marketplace with the Compulsory Cable License to help copyright owners get a fair shake for distribution of their product outside local viewing areas. Congress valiantly attempted to devise a mechanism to approximate the compensation of a free and fair market, despite the horrendous problems of fairly and efficiently distributing royalty proceeds to copyright owners through the Copyright Tribunal.

But today interactive cable systems exist in statistically adequate numbers in enough markets to provide projectable national audience data at affordable cost, as discussed in Attachment A, prepared by Robert Schultz, president of VideoProbe-Index, Inc., cable's first audience research firm. And the same will inevitably be true of all markets. A workable market mechanism is now in place to serve the middle pathway, and government efforts to approximate this market mechanism are no longer necessary. The Cable Compulsory License in Section 111 of the 1976 Act is obsolete and should be given the "sunset" treatment.

Regarding a copyright owner's rights to enforce exclusive geographic agreements, he is certainly entitled to do this if he uses a "closed" distribution channel which technically is capable of providing exclusivity. Cable networks can provide territorial exclusivity through contracts with cable operators. And scramblers and addressable convertors used with cable and subscription broadcast permit even tighter exclusivity—to those willing to pay premium prices. Casette or disk distribution represent additional outlets where copyright owners can channel programming selectively to those who pay. And even greater protection for copyright owners will soon be possible through the use of special terminals, which several parties have indicated will be introduced to the market next year.

But it is something else to ask government to enforce exclusivity when a program is cast out into "the public domain" and onto the public airwaves where technically anyone can view this ad-supported programming with an augmented receiver. Government should not intervene with rules to determine which ad-supported broadcast can be seen by which viewer.

In the past, when ad-supported broadcasting was the only way to distribute television, syndicated exclusivity rules had some justification. But today, with new distribution channels proliferating exponentially, including many capable of providing exclusive copyright arrangements, government doesn't need to intervene by attempting to build exclusive distribution enclaves in the ad-supported television marketplace. If a copyright owner believes he can maximize profits by allocating distribution among exclusive markets, let him use a means of distribution which will technically permit him to do so—rather than insist that government insert exclusivity regulation into an otherwise free market for ad-supported television.

The only remaining reason advanced for a strong government presence in this marketplace is to foster localism in program content. This presumed government purpose was usurped under the cloak of the public interest when the F.C.C. first adopted its frequency allocation scheme back in 1952. This F.C.C. effort to foster localism in television broadcasting was augmented with complex F.C.C. cable rules, particularly those adopted in 1972. F.C.C. attempts to mandate localism in programming have never really been successful. Except for local news, which is highly profitable and doesn't need any indirect government subsidies, only a few percent of the average broadcaster's programming is local—almost all is national programming. These rules actually protect local distributors of national television, rather than facilitate localism in content. It is time government stopped trying to impose on the consumer the government's view of what the consumer wants to look at. The government thus attempts to influence the content of video speech, in direct contradiction of the First Amendment.

Granted that government has a role in enhancing the role of the First Amendment in our society by adopting rules for the information marketplace which are even more pro-competition than anti-trust rules. But government action to foster many diverse and antagonistic voices is not at all the same thing as government use of economic protectionism to influence the content of video messages.

Attempts to impose localism on video speech is an even greater affront to the First Amendment than the Fairness and Equal Opportunity rules, which are increasingly coming under First Amendment attack. If government would limit itself to rules favoring many video voices, local video voices would soon find their way. Unless and until a way can be found to get the F.C.C. out of the broadcast licensing business, Congress must be vigilant in policing the tendency of this licensing authority to influence, abridge and manage the content of speech.

V. AN ATTRACTIVE ALTERNATIVE TO H.R. 5949

Although there is time today only to sketch an alternative approach and little time to conclusively argue its merits, I would urge that you set the following four-part proposal for hearings next year:

(1) Eliminate the Compulsory Cable License in Section 111 of the Copyright Law.

(2) Retain in Copyright Law provisions to prevent deletion or substitution of television programs or commercials without the consent of the broadcaster or channel programmer.

(3) Reject all signal carriage rules, including all "must carry," network non-duplication and syndicated exclusivity rules in both Communications and Copyright Law.

(4) Adopt in Communication Law a concept of reception consent to establish a single free marketplace for ad-supported television; all licensees authorized to broadcast over the public airwaves would consent as a condtion of their license to reception by viewers employing whatever reception means they choose, wherever they are located.

Principal arguments for this approach include:

(1) Strengthening Constitutional values and free markets in our society.

(2) Even-handed treatment of viewer access to material transmitted openly over public airwaves, whatever the viewers' reception means—home, master or community antenna—and wherever they are—farms or cities, multi- or single-family dwellings.

(3) Facilitating via competition and consumer choice true localism in broadcasting and abandoning the false localism from government protection.

(4) Elimination of the need for government to attempt to distribute fairly the proceeds of the compulsory cable license. It is sad to note that today, December 3, 1982, the distribution of the first license fees payable under the 1976 Act is being argued orally in the Appellate Court here in Washington. The market could allocate copyright payments in a much faster and fairer fashion, and at considerably less cost.

VI. CONCLUSION

To sum up, H.R. 5949 is simply too flawed, and an alternative approach too attractive, to justify hasty approval of this Bill in a lame-duck session. I urge that you not act on this Bill this year, or reject it decisively if it should come to a vote. I would also urge that next year you initiate a full study and hearings on the alternative approach sketched above.

A closing comment. H.R. 5949 may be symptomatic of what some observers believe is a growing failure of American politics: the triumph of collaborating special interests pursuing short-term goals at the expense of the broader public interest in the proven and enduring values of our society. By rejecting this Bill decisively your Committees will signal that such a foreboding trend isn't necessarily so.

ATTACHMENT A

The prospect for more accurate measurement of viewing within local cable subscribers universes improves with each day. Whereas all of the aforementioned video pathways will be measured with greater accuracy, the ability to pin-point the actual performance of television stations outside their local markets will be most pertinent to this testimony.

I. CURRENT METHODOLOGY—VIEWING DIARY

The accepted methodology for measuring local television viewing is seven day viewing diary employed by A.C. Nielsen and Arbitron Ratings Company. This diary can cope with the viewing potential of the 12 channel system. The ratings services agree that a cable oriented diary is needed to measure the more fragmented viewing of the growing number of multichannel systems. Wtih this in mind both Nielsen and Arbitron are testing special diaries more sensitive to the plethora of cable-only channels. While "imported" stations are adequately measured now by the diaries, the newer cable oriented diaries will certainly improve the accuracy of all ratings.

The Nielsen test is industry sponsored as CAMS (Cable Audience Measurement Study) at a cost of over $300,000. This will compare the performance of various cable diaries and telephonic survey techniques with a control sample provided by the interactive QUBE system in Columbus, Ohio. Arbitron is also testing its cable diary against an interactive cable sample. Results will be available to the industry early in 1983. Both services measure 210 to 220 local markets with diary samples ranging from 200 to 2,300 diaries per market, depending on size. Most markets have over 400 dairies. Following the tests, we can anticipate a timely shift to diaries that can measure even more accurately the market place for those stations delivered indirectly to audiences by means of cable.

II. CURRENT METHODOLOGY—METERS

While the diary improvements will provide an interim means of measuring the impact of "imported" stations, the growing list of markets with interactive capability will help define the market place even more sharply. Both Nielsen and Arbitron are now providing interactive ratings by means of meters. The Nielsen national meter sample of 1,250 will be 1,700 within a year or so, and eventually raised to 2,000. A cable meter sample of over 1,000 will be in place in 1984 for accurate measurement of the "superstations"—WTBS, WGN and WOR. In fact, the current cable sample of almost 500 is already providing WTBS with viable national ratings.

On the local level the ratings services have installed 350 to 500 meters in the leading markets. Nielsen is already in New York, Chicago, Los Angeles, San Francisco and Philadelphia. Washington, D.C. will soon be on line. More are planned. Arbitron is now in New York, Chicago, Los Angeles and San Francisco. Philadelphia is scheduled for January, 1983. Dallas-Ft. Worth is set for March while Washington, D.C. is set for June. Detroit and Miami will be added later in the year. Also in the works for the Arbitron meter are: Houston, Boston, St. Louis, Cleveland and Minneapolis. Together, these fourteen markets will be providing a representative, interactive cross-section of the Videl Pathway No. 2 market within the near future. The combination of the new Nielsen national meter sample, the "Cable-ready" diary and the multiplying local meters offers a realistic market place solution to the allocation of copyright fees.

III. CURRENT AND FUTURE METHODOLOGY—INTERACTIVE CABLE

While economic considerations will limit the broadcast meter to the largest markets, present and future cable technology will spread the availability of interactive measurement from these markets to many medium and smaller markets. We already know of the interactive QUBE households that are already proving accurate, continuous viewing data in Columbus, Cincinnati and Pittsburgh. Houston, Dallas and St. Louis can also be added. Cox's INDAX interactive system covers San Diego and Omaha. Both Warner-Amex and Cox will extend QUBE and INDZX to new builds. Recent awards in almost all large and medium sized cities, as well as new builds, are based on specifications of two-way interactivity. Rebuilds in the near future will also convert many systems to interactivity mainly because of pay-per-view considerations. The demands of advertisers for accurate ratings are and will be a major impetus to electronic ratings made possible by interactivity.

Other two-way systems now able to offer electronic ratings include Lynbrook-Lawrence, N.Y., Waukegan, IL, Providence, R.I., Dracut, MA, Florrisant, MO, Boone-Kenton County, KY and Portland, OR. Others are wired as we testify here today. In fact, Rogers/UA, operator of of Portland system will have almost 3,000 miles of active two-way by the end of 1983.

IV. CURRENT AND FUTURE METHODOLOGY—HYBRID TECHNOLOGY

Finally we come to a technology that can speed considerably the availability of electronic audience measurement, the hybrid approach made possible by a combination of coaxial cable and telephone lines. Without any need for the cable system to rebuild or upgrade, two-way activities can be added, including ratings. The economy of this technology can result in a much faster conversion to electronic audience measurement than previously contemplated.

Notable among the hybrid technology is the EIDAK Universal Converter. This system enables the subscriber to select his or her viewing by pressing a button on a hand-held tuner. The selections are then automatically dialed on the regular home telephone to the cable head end for a complete and continuous record of all viewing selections. This is analogous to two-way cable or meters in terms of electronic monitoring. Another leader in the cable down-stream/telephone up-stream technology is

Zenith Radio Corporation's Z-Tac converter. The cable/telephone connection, as represented by VVR Associates' EIDAK and Zenith's Z-Tac will be significantly available in 1983.

V. CONCLUSION

Audience measurement techniques geared to the requirements of Video Pathway No. 2—the indirect delivery of broadcast by cable—are well under way.

1. Nielsen expanding national meter sample to 2,000 (over 1,000 cable).
2. Nielsen and Arbitron tests leading to cable-sensitive viewing diaries (100,000 diaries per semi-annual "sweep" for each service are now available for measuring all cable viewing. Eventually these diaries will all be cable-sensitive for even more accurate measurement.)
3. Nielsen or Arbitron electronic meters soon in fourteen top markets. (These are where cable is experiencing greatest growth.)
4. QUBE and INDAX expanding.
5. Two-way new builds adding large interactive samples to pool.
6. Rebuilds will also increase interactive samples.
7. Hybrid cable/telephone interactive technology making significant start in 1983, with rapid growth in 1984 and 1985 until the end of the decade.

There is sufficient sample now for decisions regarding the consumer usage of broadcast stations delivered by cable. Within the next two years there will be a significant sample for more precise assessment of the viewer/consumer market place.

Chairman THURMOND. Thank you. Mr. Serrao?

Mr. SERRAO. Thank you, Senator. My name is John Serrao, and I am president and general manager of KTRV, channel 12 in Nampa-Boise, a very small market. We have submitted testimony for the record.

We fully support the bill, H.R. 5949, as it pertains to syndicated exclusivity and must-carry rules. We also support the compromise on the stay for the CRT that was recommended earlier today by the NAB and the NCTA. They did recommend a stay for 6 months. We would like to recommend a stay for 1 year, 1 full year, in order to give time to all parties concerned, a fair chance to work out a more equitable solution.

KTRV—let me take you back to the small, little community in the West—began operations October 18, 1981. According to ARB and NSI, the survey people, we ranked among the top five independents in the United States. That was 1 month after we came on for the full broadcast day, and No. 1 in prime time. We still hold that position.

This performance clearly demonstrated one thing, and that was the public's desire for an alternative to the three network and affiliated stations in our market.

Now, Idaho is small and sparsely populated, and the key means of building viewership is to be carried on cable systems in our area where our signal cannot be seen off air. Our three network-affiliated competitors enjoy such cable carriage throughout Idaho, as well as systems in Oregon and Washington.

There are approximately 158,000 television homes in our ADI, and, Senator, that is so small you might compare it to three apartment houses in Flushing. Nevertheless, of the 158,000 TV homes in our ADI, 42,000 are served by cable systems. Of these 42,000 cable homes, 19,500 are outside of our must-carry area. Thus, we miss out on one out of every eight homes in our market.

I am grateful to the committee for the chance to be here today. The event that triggered our visit was a major setback in negotiations with the Twin Falls Cable System comprised of some 13,000 subscribers. We were able to be—they were going to add us this month, at the end of this month, until the astronomical, and I say absurd, CRT royalty rate reared its ugly and discriminating head.

In a sense, we have been cleared by the FCC by their elimination of the distant signal rule, and we have been blocked by the CRT, which, in effect, reimposes the old FCC rule. The unfair CRT rate of 3.7 applies to us and is about as exciting as a cut in salary, and that is what will be happening to us, as the CRT action will deny diversification of programing, which is in the public interest, and cause a loss of projected revenues for us in excess of a quarter of a million dollars. And this station is in its first year of operation; it will lose $800,000. I wish I could tell Senator Long about that.

In other words, we could lose a quarter of a million dollars because of this denial, and we cannot compete with our Boise network-affiliated competitors. Hence, the copyright owners will not get their 3.75 percent—not on that system. And no one wins. Especially the Twin Falls viewers who will continue to be fed a duplicated set of network signals, as well as an independent station located in the South on an eastern time zone.

Well, let's face it. The CRT's excessive rate is directed at the heart of 45 new independent stations who have signed on the air since June 24, 1981, and another 151 who will be coming on over the next 3 to 4 years. I think they have been forgotten. After building three UHF's in larger markets over the last 17 years, I can assure you it has been much more difficult to make it in a small market even as a VHF facility.

It is critically important to at least get a chance to start even with our competitors. If you do not stay the action of the CRT, the viewers of our market area in our own State will be denied a powerful force of program diversity, and we, as the owners of KTRV, will be denied the right to compete on an equal basis with our competitors.

Thank you.

[The statement follows:]

STATEMENT OF JOHN A. SERRAO, GENERAL MANAGER, PEYTON BROADCASTING, LTD.

My name is John A. Serrao and I am General Manager of Peyton Broadcasting, Ltd. ("Peyton") and major stockholder of the corporation which is the general partner of Peyton. Peyton owns and operates television station KTRV, Channel 12, which is licensed by the FCC to serve Nampa-Boise and Caldwell, Idaho. KTRV is an independent television station, that is, it is not affiliated with any of the three major national television networks.

For the more than twenty years that I have been involved in the broadcasting industry, I have been an outspoken proponent of independent commercial television, both VHF and UHF stations, as a viable alternative source of programming to that offered the public by the three national networks. As such, I placed the first major-market independent UHF commercial television station on the air, in Detroit, following Congress' enactment of the All-Channel Receiver Law in 1962. During the ensuring years, I initiated new independent UHF commercial stations in Cleveland, Ohio and Memphis, Tennessee. I am pleased to say that all of these stations ultimately achieved audience acceptance and financial success and, today, are providing their respective communities with alternative, diversified program service.

As a consequence of my long-time involvement and interest in independent commercial television, I am a director and officer of INTV, the national association of independent television operators. I am not, however, appearing here as a representative or spokesman for that organization; but it is my long time concern for and commitment to the proper development of nationwide independent television service that brings me before you today.

KTRV is a young, new independent television station, having initiated operations on October 18, 1981. The Boise television market, which includes Nampa and Caldwell, is ranked 140th out of 211 recognized television markets in the country. With the advent of KTRV, Boise-Nampa-Caldwell became the smallest television market in the United States to have its own, local independent television station, providing viewers with a programming alternative to that of the three network affiliated stations already serving the market.

That the public wants and needs the programming choice offered by KTRV is reflected in the results of the audience viewing surveys conducted since the stations started operations. In the month after we went on the air our share of the weekday prime-time market had already reached 25 (comparable with that of the established network stations in Boise), according to the November, 1981, Arbitron ratings.

This evidence of the public's acceptance of KTRV's program service obviously is gratifying. But, KTRV will be unable to sustain, no less improve upon this service if it is denied the opportunity to maximize its viewership and on the same terms and conditions as the three network affiliated stations with which it must compete in the Boise television market. The cable copyright legislation which you are now considering, if left unchanged, in effect and fact, denies KTRV this fair and equitable competitive opportunity.

For a station such as KTRV, serving a relatively small market in a somewhat sparsely populated state, an important means of building viewership is to be carried on cable systems in areas where, due to distance from Boise and/or terrain features, its signal is not easily viewable directly off-the-air.[1] KTRV's network affiliated competitors in Boise now enjoy such cable carriage throughout Idaho and even on cable systems in areas of Washington and Oregon.

Pursuant to the Federal Communications Commission's ("FCC") cable distant signal carriage rules which existed until June 24, 1981, KTRV, by regulatory fiat would have been denied the cable carriage it needed to effectively compete and provide a viable service. These rules provided that cable systems, such as those on which KTRV seeks carriage, were limited to the carriage of three network affiliated stations and a single independent commercial television station. By the time KTRV commenced operations most of the cable systems were carrying the signal of one of the independent, so-called, "super-stations" located in Atlanta, Chicago and Los Angeles. Consequently the cable systems had the full complement of distant signals permitted by the FCC's rules and could not carry KTRV even if they wanted to.

In 1980, however, the FCC eliminated its rules restricting cable carriage of distant signals. In so doing, the FCC stated:

". . . the benefits to existing and potential cable households from permitting carriage of additional signals are substantial. Millions of households may be afforded not only increased viewing options, but also access to a diversity of services from cable television that presently is unavailable in their communities. . . .

[W]e believe that relaxation of our distant signal carriage restrictions will promote substantial improvements in television service to the public . . ." *In the Matter of Cable Television Syndicated Exclusivity Rules,* 79 FCC 2d 663 (1980).

The FCC's action was affirmed by the courts and became effective June 24, 1981.

Reacting to the opportunity afforded us by the FCC, we contacted cable systems throughout Idaho requesting they initiate carriage of KTRV. Discussions ensued, particularly with the system serving some 13,000 homes in the Twin Falls area. We resolved some technical issues and were ready to begin operations when we discovered, for the first time, that the new distant signal royalty rate as set on October 20, 1982 by the Copyright Royalty Tribunal ("CRT"), effectively barred KTRV from carriage on this cable system.

As this Subcommittee knows, the 1976 Copyright Act prescribed statutory royalty rates to be assessed on cable operators carrying distant signals. Congress provided, however, that if the FCC's distant signal rules were modified, presumably to allow some additional distant signals to be carried, the CRT could adjust the royalty rate to reflect the carriage of these new signals. On the other hand, Congress also provided that the statutory royalty rates could not be similarly adjusted for signals carried pursuant to the existing rules.

No one, in 1976, apparently foresaw the FCC's complete repeal of its distant signal rules. Following that action, the CRT, pursuant to its statutory authority, set the royalty rate for "new" distant signals at 3.75 percent of gross cable subscriber revenues for each new distant signal equivalent carried. In the meantime, the royalty rate for carriage of existing, or "old," distant signals continues to be less than 1 percent, ranging from approximately 0.2 percent to 0.8 percent. Until the CRT announced its royalty rate structure for "new" distant signals, we had been assured by several substantial Idaho cable systems, all of which carry the signals of our affiliated competitors in Boise, that KTRV's signal would be added to their systems. Since the CRT's announcement we have been advised by them that the astronomical increase in the royalty rates for "new" signals, such as KTRV's, makes its carriage economically unfeasible; and, in fact, it will not be carried.

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[1] There are approximately 158,000 homes in the ADI (area of dominant influence) of KTRV, of which about 42,000 are served by cable systems. Of these 42,000 cable homes 19,500 are outside of the must-carry area. Thus, KTRV cannot reach some 1 out of 8 of the homes in its ADI unless it is carried on cable. In addition, in the Nampa/Boise survey area there an additional 24,000 cable-served homes, for a total of more than 43,500 homes that must be reached by cable.

The CRT's ruling places an embargo on cable carriage of KTRV's signal. The station essentially is in the same position as it was when the FCC's restrictive distant signal rules were in force. Not only is KTRV denied cable carriage, it is denied the very same cable carriage presently enjoyed by it network affiliated competitors in Boise. This places KTRV at a disadvantage vis-a-vis the affiliated stations in the competition for advertising revenues. The enormity of this disadvantage is reflected in the fact that the refusal of just one cable system, serving 13,000 subscribers in Twin Falls, Idaho, to carry KTRV will cost the station $75,000 to $100,000 per year in lost advertising revenues. KTRV cannot be expected to forego revenues of this magnitude, revenue enjoyed by its network-affiliated competitors, if it is to provide continuing and improving service to the public.

NOVEMBER 1981 SURVEY FOR THE TWIN FALLS, IDAHO, AREA SHOW THE FOLLOWING RATINGS FOR THE BOISE-BASED STATIONS

	Monday–Friday 7–10 p.m.	Monday–Friday 3:30–6:30 p.m.	Saturday and Sunday 1–4 p.m.
KBCI (CBS)	7	2	3
KIVI (ABC)	10	4	5
KTVB (NBC)	7	4	3
KTRV (IND)	0	0	0

KTRV's situation is neither isolated nor unique. Since the repeal of the FCC's distant signal rules, approximately 45 new television stations have gone on the air, most of them independent commercial operations. For copyright purposes they all will be "new" stations and subject to the same treatment now being suffered by KTRV. Moreover, the FCC has issued permits for 151 television stations which in the near future will be initiating operations, mostly as independent commercial facilities. They too will be "new" stations and subject to the treatment afforded KTRV.

Finally there are many independent commercial stations now being carried by cable systems which will be considered as "new" pursuant to the CRT's ruling and subject to the substantially increased royalty rate. As a consequence, many affected cable operators have already issued public statements that they will be forced to drop those signals.

The situation which has evolved from these regulatory events is, to put it charitably, a real communications policy anomoly. On the other hand, the FCC has declared that the development of the national telecommunications system mandated by the Communications Act of 1934 requires a policy of encouraging more diverse sources of programing for cable systems, especially distant broadcast signals. It thus repealed the restrictions on their carriage. On the other hand, the CRT has established a royalty rate which frustrates implementation of the FCC's policy. Congress should act to prevent such countervailing activities.

We have some real doubt whether the copyright owners will, as a practical matter, benefit from the recent CRT action. In my opinion, very few, if any, distant signals will be carried at the 3.75 percent rate. The result will be that very few royalties will in fact be generated under the new rate and many that are being generated now will cease. I am certain that this is not what the Congress originally intended when it enacted the 1976 Copyright Act.

However, my request, which I am sure is shared by many other new, independent broadcasters, is that the disadvantage in which we are placed be eliminated in this legislation. It can be done either of two ways. First, and more preferably, by raising the statutory rate somewhat (perhaps to 1.50 percent for the first distant signal equivalent, with the rate scaling down to 0.3 percent for the fifth and each subsequent DSE) and applying it to all distant signals, irrespective of whether they could have been carried under the FCC's old distant signal rules.

Alternatively, but less preferable, the proviso in 17 U.S.C. § 801(b)(2)(B) which the CRT has interpreted as mandating a different rate structure for new distant signals should be eliminated. If this is done, however, it should be accompanied by a listing of more specific criteria to be applied by the CRT in making adjustments, including (1) recognition of the declining value of additional distant signals and (2) consideration of the affect on total revenue to copyright holders. This second option is more complicated and thus not as good as good a solution as the first option, but it is still preferable to the existing situation.

Chairman THURMOND. I am going to call on the able Senator from Vermont to present the witness who is from his Sate.

Senator LEAHY. Thank you, Mr. Chairman. I found not only the hearings interesting so far today, but I think it has been wise that we have had this joint meeting of your committee, the Judiciary Committee, and Senator Packwood's committee, the Commerce Committee. It saves all these gentlemen the necessity or, some may feel, the opportunity to come and testify twice.

Peter Martin, Mr. Chairman, is a well-respected person from the State of Vermont. He and his father have our State's largest television station; in many ways, our only statewide station because of the innovation that they have shown over the last 20 or 30 years, especially in utilizing state-of-the-art technology—the ability to get their signal around in basically a very rural, very mountainous and often thinly populated State. For many of us in Vermont, we would not have access to television at all were it not for WCAX-TV, which is run by the Martins.

At home in Burlington I can listen to a lot of stations including the Canadian ones. When I get to what I think of as my real home out in the woods of Middlesex, there it is WCAX-TV.

And I think that it is important that he be here because he can give two perspectives, Mr. Chairman. One, the perspective of a typical owner in a smaller, less urban area, but also the unique perspective of someone who is on the Canadian border and has to deal with the difficulties that we face with the Canadian Government's particular attitudes toward American television.

Chairman THURMOND. We will be glad to hear from you, Mr. Martin.

Mr. MARTIN. Thank you very much, Senator Leahy, Senator.

Chairman THURMOND. There is a vote on. We may have to leave here before you finish, and if we do have to leave to vote, the chief counsel of either committee here can carry on until we get back. You may proceed.

Mr. MARTIN. Senator Leahy has indicated that I am vice president of WCAX-TV in Burlington, Vt., which has for many years provided service to Vermont, in upstate New York and New Hampshire, and in nearby areas of Canada. We serve Montreal and eastern townships and surrounding areas over the air and via local cable systems.

Our signal is also carried by microwave to the cable systems in Quebec City and even further east, well over 200 miles from Burlington.

The Copyright Act of 1976 was extremely generous to copyright holders in Canada and Mexico. If American cable systems beyond 150 miles from either border carried the signals of Canadian or

Mexican stations, they are subject to full copyright liability to the foreign copyright owners. If American cable systems within 150 miles of either border carry the signals of Canadian or Mexican stations, the foreign copyright owners enjoy all of the protections, such as they are, that our law provides for the owners of copyright in the service broadcast by American stations. They are entitled to share in the royalties our cable systems pay for the privilege of carrying distant signals, and they are protected against the deletion of commercials or alteration of program content.

I stress the protection that is afforded against the deletion of commercials. That protection reflects a recognition that the royalties which cable systems pay under the compulsory license do not fully compensate copyright owners for the use of their creative works. The owners must also depend in large part on the advertising revenues that broadcast stations earn and the fees that they pay or costs they incur for the service they provide.

I am, however, not an expert on the manner in which Mexico has responded to this generosity. I have considerable experience, however, with the Canadian response. Canada does not now and never has provided any compensation for the use which its thriving cable industry makes of American television signals; not to stations, not to copyright owners, not to anyone.

In the past, its regulatory authorities have threatened to require that Canadian cable systems delete commercials on the signals of American stations. While that threat has not yet been carried out on any widespread basis, it has been carried out. And in addition, the Canadians have, for some years, had in place a tax device that deters advertising on American stations by denying income tax deductions to Canadian advertisers for such expenditures.

The result is that Canada continues to enjoy the benefits of American television service without providing compensation of the kind that Canadian copyright owners derive from our law.

At the same time, Canada attempts to choke off the advertising revenues that are the sole remaining source of compensation which this country might derive for the services its stations render to Canada.

We need not go through the detailed history of this matter; the many protests that have been made, the findings by two Presidents that the Canadian practice is unfair and discriminatory, or the efforts thus far unsuccessful to persuade the Canadian Government to enter into negotiations on this subject. Nor do we ask that the copyright law be employed as a bargaining device on behalf of the affected American stations.

At the very least, however, we should insist that our generosity be met with some minimum response on the Canadian side. One appropriate step would be to foreclose, as Senator Leahy's amendment would do, payment of cable royalties by the Copyright Royalty Tribunal to nonresident, foreign nationals whose countries do not compensate U.S. citizens for the retransmission of materials in which they own a copyright.

Such a step would not, by any means, resolve the problems that Canada's treatment of American stations has created. It would, however, send a clear and unequivocal message to our Canadian neighbors whose conduct toward us can sometime be startingly inconsistent with their country's own basic traditions of fairmindedness and responsibility. And that message should be: There are limits to American generosity.

This country expects a minimum degree of fairness reciprocity and mutual respect as the basis for its bilateral relationships with others. Thank you, Senator.

Senator LEAHY [presiding]. I am going to have to leave for the vote. I have 3 minutes left to get to the floor.

But let me just ask you a couple of really quick questions. I agree with you on the unfairness to American copyright owners of the Canadian law. At the same time, we are compensating Canadian copyright owners.

Does that really have an effect on your station's operations, or operating revenues?

Mr. MARTIN. In the entire Canadian situation it has had a very serious effect on all the border stations. It has had a very measurable effect for us, not as catastrophic as it has been for some of the stations to the west of us, but yes, there is a very real and measurable effect.

ANSWERS BY PETER MARTIN TO QUESTIONS OF SENATOR LEAHY

Question 1. Mr. Martin, I know it is irritating to think of the unfairness to American copyright owners of the Canadian law that denies them compensation, while American law compensates Canadian copyright holders for the use of their transmissions by American cable companies. But does this unfairness hamper your station's operations or have a significant dollar impact?

Answer. I would respectfully take issue, Senator, with the apparent premise of your question. I have always understood that copyright is a property right, granted by Congress to reward and stimulate creative effort—that a copyright infringer must pay, not only for the damage he does, but for the profits he makes in exploiting someone else's work. It is widely recognized that the Canadian cable industry was created and has up to now operated at a profit primarily by bringing the signals of Amercan stations to Canadian viewers. When they bring the signal of WCAX-TV, not only to Montreal, but as far away as Quebec City, they are exploiting our creative efforts and those of all the companies from whom we acquire programing. They reap profits in which we and our program suppliers are entitled to share.

While I cannot put a dollar figure on the profits to Americans or to our station that are lost in this process, you should be aware that our situation is repeated many times along the border. Stations in Plattsburgh, Watertown, Buffalo, Erie, Cleveland, Detroit, Cheboygan, Sault Ste. Marie—all the way to Spokane, Seattle and Bellingham—are widely viewed in Canada via cable. There is a proposal now pending before the Canadian Radio-Television and Telecommunications Commission to distribute the signals of the three Detroit network-affiliated television stations via satellite all over northern Canada.

All of this has gone on for years without a penny of compensation to Americans. Meanwhile, although Canadian signals are not distributed at all widely in the United States, our Copyright Royalty Tribunal has ordered the payment of over $150,000 in cable royalties to Canadian claimants for 1979 alone (47 Federal Register 9897). That amount will grow dramatically as the cable royalty fund expands. It seems to me that "irritating" is too mild a word to describe the situation. Resources that should reward and stimulate American creativity are being siphoned off for the benefit of others.

You should keep in mind also the threat to have Canadian cable systems delete the commercials of American stations and the tax device that heavily deters Canadian advertising on U.S. stations. These additional steps impair the ability of American stations to obtain compensation for themselves or pay their program suppliers for the service they render to Canada.

Question 2. As you not, Canadian law also denies a tax deduction to Canadian advertisers who want to place ads on American stations because these stations reach the Canadian market. Have you been able to estimate the impact of this provision on your station's revenues and if so, what is that impact?

Answer. We compete vigorously against two other stations in the Burlington-Plattsburgh market and the details concerning our Canadian revenues can be quite sensitive competitive information. I would therefore not want to spread such details on the public record. I can tell you, however, that in the year after the Canadian tax law took effect (1977), our Canadian revenues were less than 60 percent of those the year before (1976). There has been some increase since then, but there have also been increases in the size of the Canadian market. Our revenues from Canada are plainly far less than they would have been. In Buffalo, N.Y., for instance, total Canadian revenue for the three stations was $9-10 million in 1975. This year the total will be under $3 million. In Watertown, N.Y., the market just to the west of my market, Canadian revenues have shrunk from about 33 percent to 5 percent of total revenues. In 1980, President Carter found that the Canadian law had resulted in the loss of access by U.S. broadcasters generally of some $20 million annually.

Question 3. From your knowledge of the Canadian industry, if the Congress were to adopt a statute mirroring the Canadian copyright law that denies payments to our copyright owners, and such a statute be likely to have a significant impact in Canada and possibly cause reconsideration of their discriminatory statute?

Answer. I doubt that the sheer loss of dollars to Canada resulting from a denial of U.S. cable royalties would have an effect of the kind you suggest. There would, however, be two other, critically important effects.

First, as the Canadian governmental report you quoted earlier indicates, there is a tendency north of the border "to feel that Canada can get something for nothing by restricting copyright payments abroad," and that feeling "is probably close to the truth with present day realities." We can never hope to change that attitude until Congress makes clear that it understands the issue, and that the Canadian attitude is simply unacceptable. I believe that a firm Congressional stand would be heard in Canada, while Congressional inaction would reinforce the tendency to accept a free lunch at the expense of American copyright owners.

Second, you are aware from discussion with your Canadian counterparts at the Interparliamentary Commission meetings that Canada has always presented these broadcast measures as essential to Canada's cultural sovereignty and that they are therefore nonnegotiable. There appears to be a growing realization in Canada that the most irksome of those measures, particularly the tax policy, do not in fact protect Canada's culture. I draw your attention to a report issued last month by the Federal Cultural Policy Review Committee:

> There can be no doubt about the value of these three measures (including the denial of tax deductions for Canadian advertisers on U.S. stations) to private broadcasters. From the point of view of this Committee, which sees cultural policy as the promotion of creative and artistic expression as well as the access of audiences to that expression, these measures have to be viewed as elements to an industrial policy, not a cultural policy. (Report of the Federal Cultural Policy Committee, November 1982, p. 283.)

Canadians are at heart fair-minded and responsible people. If Congress adopts the modest step I am urging today, it will effectively require Canada to examine its policies where they are least defensible in the eyes of informed Canadian opinion. There, in my opinion, lies the real hope for progress in this difficult area of United States-Canadian relations. Progress in copyright will lead to progress in the other spheres as well. But progress in any sphere will only come if we insist thoughtfully and carefully, but above all firmly, on reciprocity and fair dealing.

Senator LEAHY. Thank you.

I will turn it over to our chief counsel. I will be back in a bit.

Mr. COURSEN. Mr. MacLeod.

Mr. MACLEOD. Thank you. I appreciate your having me here today.

My name is Rod MacLeod. I am from western Massachusetts. We are an independent cable operator. The cable system in Massillon, Ohio, with 22,000 families, has asked us to speak for them as well.

But I really think that, until this panel, every single speaker today has represented a special interest group. The first panel was the special interest groups that were included in the bill, and the second and third panels were the special interest groups that were not included in the bill.

This panel—and in particular, myself, am really the only one up here speaking for the viewers; and I believe I represent 25 million cable viewers, as presumptuous as that may sound, because they despise what they call Federal blackouts, which is what I am here to talk about; syndicated exclusivity.

The old rules were so cumbersome to be employed against cable systems that most broadcasters did not do it. But we had one who did, and our people screamed at us when a show would be blacked out. Now, to make sure you understand how it works, if "Bridge on the River Kwai" is on here tonight in Washington, brought in on cable by a station from out of town, and a local broadcaster has the rights to that—he may have played it 2 years ago; he may play it 2 years from now as part of an 8-year contract—but if you sit down with your family to have a little fondue on a Friday night and relax and watch a favorite movie, all of a sudden that screen is going to go blank on you, for seemingly no reason.

Our people knew about it because we had a broadcaster that made us do it up until June of 1981. Most systems did not, so, most people in this country do not know. They are being kept in the dark. You are being kept in the dark.

Attempts are being made to hoodwink Congress into thinking that this is not a controversial bill, but people are going to scream about this. When we saw this being reinstituted in the bill, we did a little demonstration in western Massachusetts. We blacked out the affected channels for 2 hours and put up a sign asking people what they thought about it. Well, the phones rang off the hook, because they were screaming again. They did not want it back. They know what is going on, and they are hoping that we can come down here today and explain it to you.

I urge every Senator to give this a test in his home State. Ask an independent cable operator that is not owned by a broadcaster and not owned by a movie owner, who do own 8 out of the 10 largest cable companies in this country, ask an independent to run such a test. Put up a sign. Ask the people what they think when you black out their show.

But the perverse part—and we would not be satisfied with the CRT ruling being overturned—but the perverse part is that at the same time we are being asked to eliminate what may be 1 out of 3 shows on 5 channels, we have to pass along what amounts to a $7 tax on all of our subscribers because of the ridiculous CRT rate increase. This is absolutely incredible. The only thing I can do is refer back to Senator Leahy's comments when he referred to this as a Christmas tree bill with a gift under the tree for everyone included in the special compromise.

Well, I am here to say that a Christmas tree with a present under it for every one of them is not good enough for them. They are also asking Congress to provide them with a Christmas feast by stealing TV dinners from the public. I know you will not do it when you consider it. Do not let them black out the people's TV screens. We did it, and they screamed. They hated it. And I am telling you, if you try it in your home States, they will hate it there, too. They are not interested in who gets the biggest piece of the pie between the broadcasters or the cable interests or the movie owners or anyone else. All they know is they sit at home, they sit down to watch television at night, and for some unexplained reason what is listed in the TV Guide, what is listed in the newspaper does not show up on the screen. They just cannot believe—they could not believe before, and we had serious public relations problems. They could not believe that Federal law would make us do such a stupid thing. And I know you will not reimpose it.

I seriously appreciate your inviting me down here. Thank you.
[The statement follows:]

STATEMENT OF RODERICK A. MACLEOD, PRESIDENT, COMMONWEALTH CABLEVISION OF MASSACHUSETTS, INC.

Thank you for the opportunity to share my views with you. I am Roderick A. MacLeod, President of Commonwealth Cablevision of Massachusetts, Inc., Westfield, Massachusetts. I have been involved in the cable television industry for the last 14 years. Commonwealth Cablevision is an independent cable television company with 30,000 subscribers in Agawam, Granby, Holyoke, South Hadley, Southwick, West Springfield, and Westfield, Massachusetts. Commonwealth Cablevision is not owned by television broadcast or program production interests. I emphasize that my company is independent; it is not a broadcaster or program owner nor is it controlled by them. This is important because as of May 31, 1982, eight of the ten largest cable television companies were controlled by broadcasters or program producers, or both. Unlike independent cable operators, their self-interest is not directly in line with the interest of their viewers.

I believe I speak for the interests of cable television viewers nationwide who now number over 25,000,000 families.

Although I believe this bill is bad for a number of reasons, my testimony addresses only the syndicated program exclusivity provisions of H.R. 5949. Syndicated exclusivity (or what our subscribers call "Federal Blackouts"), rejected by the FCC and the Courts, would be reimposed by this bill. Let me take a moment to explain my understanding of syndicated exclusivity and how it works.

Syndicated exclusivity is a scheme of giving exclusive rights to certain broadcasters for packages of syndicated series programs, movies, and sports. For all practical purposes, "syndicated" simply means not currently showing on ABC, CBS, or NBC. Independent television stations such as WTTG (5) and WDCA (20) here in Washington, therefore, have program schedules made up of syndicated programing. Network affiliates may carry syndicated programing in their nonnetwork hours. Under syndicated exclusivity rules, a local broadcaster is given the right by program producers, distributors, and copyright owners to prohibit viewers from seeing this syndicated programing on any channel but his own, even if he is not carrying the programing at that time and may have no plans to carry it at all. He may simply control it as part of a package deal he made with the copyright owner. A movie he plans to run, like "Bridge on the River Kwai," may have been shown by a local broadcaster in the summer of 1980 and he may show it again in the spring of 1984, all as part of an 8-year contract. But if "Bridge on the River Kwai" is shown tonight by an out-of-town station carried on the local cable system, the local viewer would be prohibited from seeing it. The same is true of series such as "Mary Tyler Moore," "Barney Miller," "The Odd Couple," and hundreds more. These Federal blackouts may be in effect for as long as 8 years.

Until 1981, the FCC gave certain broadcasters syndicated exclusivity protection. The rules were as cumbersome for broadcasters to follow as they were for us to obey, so not many demand protection from cable systems in their areas. The Washington Post station, WFSB-TV in Hartford, Connecticut, was the only one entitled to protection from our Massachusetts system under the old rules, and they began insisting on it in 1980. Can you imagine that Boston signals had to be blacked out to protect a Hartford station? Even when the Hartford station was not showing the program. Thus our subscribers were forced to live through the misery of Federal Blackouts in 1980 and 1981.

They hated it. When they would sit down to watch a favorite show listed in the newspaper or TV Guide, the screen would suddenly go blank. They screamed at us, and we had serious public relations problems in Westfield because we could not make them believe that Federal Law required us to do such a stupid thing.

In practice, Federal Blackouts are even worse than you would suppose since the only practical way for a cable operator to switch off these shows is by means of a computer/switcher, programmed weekly to turn on and off various channels at the times demanded by the local stations. Because broadcasters don't always follow their advance schedules, because sports events run into overtime, because baseball games are rain-delayed, because late at night broadcasters are frequently relaxed about timing their changes of programs, and for many other reasons, in practice, the Federal Blackouts are even worse than in theory. Shows are blacked out in the middle, the climax of the movie is cut, and extra innings are missed when the computer follows its programmed instructions. We worked with the problem unsuccessfully for years, and it cannot be circumvented.

Our subscribers did not calm down until June, 1981 when movie owners and broadcasters exhausted their court appeals and the FCC was allowed to drop its blackout rules. The FCC dropped the blackout rules only after a four-year, in-depth study concluded that the blackouts were harmful to the public. The FCC's Opinion and Order as published in the Federal Register on Thursday, September 11 1980, should be helpful to you:

"We examined the effect of the rules on the subscribers and potential subscribers of cable television, on local television stations, and on the supply of television programming. We concluded that the public interest would be better served in the absence of the syndicated exclusivity rules for cable television systems." 45 Fed. Reg. 60219.

"Thus we remain confident that the public will be better served without the syndicated exclusivity rules." 45 Fed. Reg. 60219.

"Thus the syndicated exclusivity rules impose substantial costs upon the subscribers and potential subscribers of cable systems by restricting many of the programming alternatives on distant signals for which consumers are willing to pay." 45 Fed. Reg. 60219.

"We found that protection of local stations against competition from distant signals imported by cable systems served no public interest purpose." 45 Fed. Reg. 60220.

"We concluded that the maintenance of the syndicated exclusivity rules would provide no improvement in the television service provided by local stations. We found that the level of profits for the television industry is expected to continue to increase even without any protection against distant signal importation by cable television systems and that cable television has little effect on the local public service programming provided by broadcast stations." 45 Fed. Reg. 60221.

I respectfully request that the full text of the FCC's Report be included in this record.

So our subscribers were well educated about syndicated exclusivity and knew just what to expect from Federal Blackouts. As H.R. 5949 made its way through the House of Representatives, we kept people apprised on the bulletin board channel of our cable system. Each time the Bill moved a step closer to passage, we got a barrage of calls begging to know what could be done to stop it. We asked the callers to be patient, because we were confident that reason would prevail over special interests and the Bill would fail.

On The morning of Thursday, September 30, 1982, we were told that H.R. 5949 had passed the House. Worse, we were advised that an attempt was to be made to suspend the Senate rules, by-pass all committees and take an immediate floor vote and the Bill would surely pass into law, because the Senators were being told that the Bill resolved a narrow issue between a few disputing parties, all of whom supported it—in other words, it was supposed to be a non-controversial compromise.

We are not prepared for that kind of parlimentary maneuvering and we didn't really think our subscribers were either. But we knew we had to do something. Then the idea of a blackout demonstration dawned on us. A demonstration would remind subscribers of the Federal Blackout experience, and give them a chance to express their views since the Bill was to be voted on any minute as far as we knew. We spoke with Senator Kennedy's office and told them we would try to ascertain the public reaction to support our judgment that consumers would hate this Bill. But we didn't know if or how the demonstration technically could be done.

Under the old FCC rules, only television stations in the top one-hundred markets could request blackouts. WFSB-TV was the only such station in our case. Nonetheless that one station initially had caused us to lose over 10 percent of the programming on the independent stations we carried. H.R. 5949 would extend blackout power to all local television stations, which meant we would be subject to blackout demands from at least three stations. After confirming this by comparing the published current schedules for our local TV stations with those of our five independent stations, we estimated our subscribers might lose one out of three shows on these five channels. The 6-8 PM time period would be one of the hardest hit and all channels would be off at times. So we blacked out programs and related commercials on the five affected channels (9 and 11 from New York and 25, 38, and 56 from Boston) from 6-8 PM on September 30, 1982, and replaced the programs with a message telling people that the Bill had passed the House and this was just the beginning of what was in store for them unless they advised Senator Kennedy at once because of the threatened rule suspension.

With that our subscribers exploded. Senator Kennedy's staff was manning the phones that very night. I was at the cable office during the demonstration and soon received calls from members of the Senator's staff in Boston and Washington who said they were receiving hundreds of calls. One aide asked, "What are you doing up there? You've taken away the people's television, they're calling up angry, they want their TV, and they're blaming the Senator."

Senator Kennedy already had asked that the Bill be referred to Committee earlier in the day. We immediately added this fact to our bulletin board message and thanked the Senator for his understanding in this matter. But the message from the public was loud and clear—They hate Federal blackouts. If you would like the results of a similar experiment in your State, just ask an independent cable operator in your State to run a test. Your constituents won't like being sacrificed to Washington and Hollywood special interests.

The attached magazine editorial reflects the depth of the public's feeling about this Bill. I also would like to submit the attached copy of an order of the Board of Aldermen of the City of Holyoke, Massachusetts, in opposition to this Bill. But the effect of this Bill is being kept a secret from the public and from you. We respectfully request home district hearings to let consumers speak for themselves. Failing that, I must deliver the message for them.

Adding insult to the potential injury of H.R. 5949, while legislation to re-impose expanded syndicated exclusivity is pending, the Copyright Royalty Tribunal has handed down a new set of rates for cable systems' carrying out of town stations (charges which, of course, are passed on to subscribers). The CRT is empowered to adjust rates under the 1976 Copyright Act. I thought some dollar figures based on our understanding would be interesting. The calculations in summary form are:

Increase due to elimination of syndicated exclusivity	$54,243
Increase due to the addition of independent WLVI Ch. 56, Boston for all our subscribers	122,262
Increase due to the addition of NBC network affiliate WBZ Ch. 4, Boston to the 60 percent of our subscribers denied it under the old FCC rules	18,340
Increase due to inflation adjustment	13,561
Total increased fees	208,406

This is the equivalent of a tax for the benefit of program producers of $7 on each of my subscribers per year. The increase in fees due to elimination of syndicated exclusivity (75 percent) is bad enough. But it would be bizarre for Congress to then reimpose the rule.

As for the large fee for adding new signals, this is legislation by agency fiat. The Copyright royalty Tribunal is re-imposing by economic means, the distant signal restrictions which the FCC dropped and is contravening the intent of the Copyright Act of 1976 which permitted such changes by the FCC.

It is true that the Copyright Act of 1976 contemplated a review of the fees if the FCC should permit systems to add signals. But the old fees were one-half of one percent for our third independent, and one would expect something along those lines for a newly added fourth independent. Instead, the CFT requires 3.7 percent or 7.5 times what we were paying for our third signal. This forces us to either drop certain channels or pass along a substantial rate increase to our subscribers.

In Natick, Massachusetts, the Company which we are helping to build a new system, faces an even greater increase. As a result, they have elected to import only WOR and WPIX from New York as their two permitted channels under the *old* FCC rules. They have elected not to carry WTBS, Ch. 17, Atlanta or WGN, Ch. 9, Chicago, for to carry them both would cost 7.5 percent of gross cable revenues.

It is obvious that this whole area of cable copyright is fraught with inequities and conflicts of interest. But the major interest being overlooked, is that of the consumer. If this Bill passes and the new CRT ruling is allowed to stand, we will have to increase our subscribers' rates substantially, and simultaneously begin blacking out about one-third of all shows on 5 channels—and "That's Incredible".

In summary, let me emphasize that the "compromise" reached for this proposed legislation is not a compromise among the affected industries, but a compromise among special interests in those industries. It is a derogation of the rights of American consumers, and when they realize this, they are going to wonder who to blame.

An attempt is being made to hoodwink Congress into thinking this Bill does not affect the public at large. In fact, there is no single segment of the citizenry who will be served by this legislation: rich/poor, old/young, Republicans/Democrats—all will be damaged by this Bill.

The motion picture owners, some naive cable operators, and the broadcasters are wasting the valuable time of Congress trying fill insatiable appetites. They don't even digest one feast before they turn around and demand another. Only this time they are asking Congress to steal TV dinners from the public. And like an animal that suspects someone is trying to sneak off with his supper, the public is growling. Please listen and vote against this Bill.

Thank you.

[From TUC, Nov. 1, 1982]

THIS IS NO CHICKEN LITTLE!

(By Robert A. Searle, President)

As we report in this issue's "Newsline" (Page 18), support for the copyright bill pending in the Senate is hardly unanimous among rank and file cable operators. But unlike his disgruntled colleagues, Commonwealth Cable's Rod McLeod decided to turn to his subscribers for support when his Washington representatives let him down. The results, in McLeod's words, were "absolutely overwhelming."

McLeod's efforts to advise Senator Ted Kennedy (D-Mass.) that several hundred of his constituents in Western Massachusetts were upset about H.R. 5949 is an excellent example of the impact one member of the cable industry can have on the legislative process. So outraged were Commonwealth Cable's subscribers that Congress might deprive them of up to one third of the distant signal programming they now pay to receive that they took the time to call—long-distance—their elected officials to express their displeasure.

At issue here is the acquiescence of the NCTA and CATA to the NAB/MPAA cabal on syndicated exclusivity "protection." Here is an industry which less than 18 months ago succeeded in a years-long effort to repeal the FCC rules suddenly reversing itself by asking Congress to pass legislation restoring the rules not for just the Top 50 markets, but *all* markets. The results will likely be catastrophic for many cable operators who will suddenly be faced with the unenviable task of informing their subscribers that programming they bought will no longer be available.

But as Commonwealth Cable's actions suggest, members of the industry who find this option distasteful have a unique weapon at their disposal. The hundreds of calls Senator Kennedy's staff received during the evening of September 30 are ample evidence that the copyright bill is much more than a settlement of grievances between special interest groups. This legislation is an anti-consumer bill, an attempt by the broadcasters and copyright owners to unfaily corner the marketplace by artificially restricting the viewing habits of cable subscribers across the country.

We recognize that there are elements of H.R. 5949 which any reasonable member of the cable industry would openly support. But the price is simply too steep. We believe that if this bill becomes law, cable operators throughout the land will face a firestorm of protest from their subscribers.

That is why the actions of one cable operator in Western Massachusetts are well worth noting—perhaps even imitating.

INTRODUCED BY ALDERMAN THOMAS M. MONAHAN, CITY OF HOLYOKE, IN BOARD OF ALDERMEN

Ordered, That the Board of Aldermen adopt a resolution in opposition to Bill No. 5949 which was sponsored by Congressman Kastenmeier, which contains a provision re-instituting Federal blackouts of independent television programming, and this resolution be sent to Senator Edward M. Kennedy. Amended: To send copy to Senator Tsongas, also.

In Board of Aldermen, Oct. 19, 1982, adopted, as amended.

JAMES J. SHEA, *Clerk.*

Presented to the Mayor for Approval Oct. 21, 1982.

JAMES J. SHEA, *City Clerk.*

Mayor's Office, Holyoke, Mass. Oct. 21, 1982.
Approved.

——— ——— *Mayor.*

Mr. **Coursen**. Thank you very much.

On behalf of the Commerce Committee, I would like to thank all of you. Senator Leahy would like to submit the rest of his questions to the panel for responses in writing. I will ask the chief counsel of the Judiciary Committee, Mr. Hultman, if he has anything further?

Mr. **Hultman**. No.

Mr. **Coursen**. Only one further matter before we adjourn these hearings, and that is that we would ask that those who are not interested in the gas tax hearing, which is coming up right now, please vacate this room as soon as possible.

These hearings are adjourned.

[Whereupon, at 1:35 p.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF COLONY COMMUNICATIONS, INC.

I am Jack Clifford, President of Colony Communications, Inc. Colony is a multiple cable system operator holding 57 franchises for fourteen systems in six states including Florida, Massachusetts, New York, Pennsylvania, Rhode Island and Vermont. Colony is owned by the Providence Journal Company which is the licensee of WPHL-TV Philadelphia and WEAN and WPJB-FM Providence, Rhode Island. As a company with both broadcast and cable properties, we feel Colony can provide a special prospective on the pending legislation, H.R. 5949.

As this Committee is well aware, the legislation now pending has been the subject of intense, multi-industry negotiations. The bill's purpose is to restore the balance that was achieved in 1976 but lost due to the rapid evolution of communication technologies and a new regulatory environment. The legislation would assure the cable industry access to distant television signals and preserve the compulsory licensing scheme, while granting television licenses guaranteed access to cable channels, and while restoring syndicated exclusivity protection for program producers and broadcasters. The fragile agreement recognizes that each party compromised its position in order to achieve a final resolution of their longstanding dispute. However, the recent ruling of the Copyright Royalty Tribunal (CRT) to raise fees dramatically, and may I add, out of all proportion to statutory guidelines, has threatened to tear the agreement apart. If the CRT"s order takes effect as planned on January 1, 1983, cable system operators like Colony face the likely prospect of deleting valued distant signals and thereby denying cable customers programming they have viewed for some time. There is simply not enough time before January 1, 1983, for cable operators to select alternative courses of action which can preserve profitability of their hugh capital investment in cable. Some concrete facts about Colony's operation will make this situation clearer for the Committee.

In 1982, Colony's cable royalty payments were approximately $230,000. Under the revised schedule, the copyright payments would increase to almost $750,000, a 335 percent increase! In the Chelmsford/Tewksbury, Massachusetts system located outside Lowell, Massachusetts, the addition of just two television stations, WGN-TV, Chicago, and WTBS-TV, Atlanta, will result in an increased cost of $75,000 for that system alone. With 8,000 subscribers, the annual cost will be $9.32 per subscriber per year, in addition to the cost of the common carrier service to provide the signals of $1.02.

With economic conditions making every American family cost-conscious, to take a television service that these subscribers have been receiving and to impose these additional costs on cable operators is inequitable and unjustified. While some rate adjustment may be appropriate, the CRT's failure to provide a responsible balance to its rate adjustment proceeding demands prompt legislative relief.

In this regard, Colony strongly supports the NCTA/NAB proposal to stay the ruling's effect and allow a new proceeding to commence promptly with clear Congressional guidance. The compromise embodied in H.R. 5949 is too important to relinguish because of the misguided ruling of the CRT.

STATEMENT OF COMCAST CORP.

I am Daniel Aaron, Senior Vice-President of Comcast Corporation, which is a multiple cable system owner with systems operating in Kentucky, Maryland, Michigan, Mississippi, New Jersey and Pennsylvania. Comcast believes that fair legislation is essential if the cable industry is to make a final peace with the broadcast and production industries so that we can move forward to the more pressing issues of improved service to the subscribing American public.

Comcast believes that the recent decision of the Copyright Royalty Tribunal (CRT) to increase drastically copyright fees has materially changed the balance which the legislation was designed to achieve. We believe that this problem must be addressed by the Senate in the form of the NCTA/NAB stay proposal if a true and fair compromise in the cable copyright area is to be secured. While H.R. 5949 retains the compulsory licensing scheme and assures the continued availability of distantly retransmitted signals, the legislation also restores syndicated program exclusivity, program protection strongly desired by the motion picture industry and gives the broadcast industry assurance of continued access to cable by enacting FCC carriage requirements into law.

The predicate for passage of H.R. 5949 has been that three industries involved have achieved a fair balance of their competing interests based upon the given factors of the marketplace. However, the CRT, by usurping the policy making functions of the Federal Communications Commission (FCC) and the Congress, has altered those factors. The CRT's recent order drastically increasing rates effectively reverses the FCC's carefully enunciated policy decision to allow increased availability of distant signals to the cable industry. In contrast to the multi-year, FCC rulemaking proceeding, which included massive staff reports and the economic studies, and the careful review of the dicision by the U.S. Court of Appeals for the 2nd Circuit, in *Malrite TV of New York* v. *FCC*, 652 F.2d 1140 (2nd Cir., 1981), cert. denied———U.S.———, 102 S.Ct. 1002 (1982), the CRT acted precipitously and rejected the reasoned judgment of the FCC. The CRT's order will force cable systems to delete distant signals in order to avoid draconian payments, far in excess of what Congress anticipated when it granted rate adjustment authority to the Tribunal in the Copyright Reform Act of 1976. The effect of the CRT's action is to resurrect the ill-conceived notion of "retransmission consent," something which the FCC, Congress and the Courts have repeatedly rejected. By contrast, the NCTA/NAB proposal, in staying implementation of the Order, would give the affected parties time to reassess the royalty rate structure in light of the legislation. The time is crucial if the American subscribing public is to continue to receive the programming they expect from cable.

Since the rate decision was announced, Comcast has evaluated its system distant signal carriage. The Flint, Michigan system, one of our largest operations, provides a good example of how the new rate structure threatens the diversity of cable service.

Determining the additional copyright liability for this system was particularly difficult because if serves a large area located in two neighboring counties, Genesee and Oakland. For technical and economic reasons, it makes sense to serve the 17 separate political jurisdictions comprising our service area on a technically-integrated basis from a common "headend." For technical and administrative reasons, it also makes sense to offer a uniform basic service package to all subscribers, regardless of where they happen to live within the service area.

Under the FCC carriage rules upon which copyright payments are based, however, certain stations that are considered "local" and that we are obligated to deliver to our Genesee County customers are considered "distant" in Oakland County and vice-versa. In one case we must pay 3.75 percent of Oakland County subscriber revenues for such a signal.

For technical reasons and also because of the current economic conditions in Flint, we recently began offering expanded services, including special interest programming and Chicago superstation WGN-TV, on an optional service tier for an extra monthly charge. Only a little over 40 percent of our subscribers have purchased this added service option, suggesting that the programming does not have sufficient appeal that the majority of our customers would be willing to pay for it. Making these added services optional, rather than including them in basic service and raising the price, seems appropriate in these circumstances.

As a signal carried because of FCC deregulation on the majority of our system, WGN-TV obligates us to a 3.75 percent payment. We believe that the Copyright Law does not required us to pay for WGN-TV based on revenues the system earns from the majority of our subscribers who neither receive nor pay for that signal. Recently, however, Flint was among a number of cable systems threatened by the Motion Picture Association with a "test case" on this issue. Even though we believe our position is legally correct, we are naturally reluctant to incur the enormous cost of litigating the question. Accordingly, we are seriously considering removing WGN-TV from our optional service tier. Clearly, a copyright payment of over $90,000 every six months (in addition to the fees we must pay for distant signals included in our basic service package) cannot be justified for a signal the majority of our subscribers are not receiving.

Preliminarily, Comcast has concluded that its overall copyright fees could increase from approximately $135,000 annually to more than $700,000 annually, a five fold increase. Because this exorbitant rate increase bears no relationship to the actual marketplace value of the signals, Comcast may have to delete programming now offered its subscribers in order to avoid draconian compulsory royalty payments. We believe this situation demands prompt legislative and judicial relief and thus urge H.R. 5949 be amended along the lines suggested by NAB and NCTA and thus to restore the balance to the copyright royalty scheme so unfairly upset by the CRT decision.

STATEMENT OF COX COMMUNICATIONS, INC.

My name is William A. Schwartz and I am president of Cox Communications, Inc. We appreciate this opportunity to present our views to the Committee on H.R. 5949.

The bill before you is a painstaking compromise crafted and endorsed by the three principle players of the cable-copyright controversey, NCTA (representing the cable television industry), NAB (representing the broadcast industry) and MPAA (representing the program production industry). Among these groups, Cox is in a unique position because it is a company which is directly involved in all three industries. On the cable side, Cox is the fourth largest cable operator in the country, and is the owner of the nation's largest system in San Diego. At the same time, Cox operates many small franchises in dozens of cities around the country. And Cox is not a newcomer to the industry; its cable experience dates back to 1962. Cox also owns broadcast stations, including six television stations, (two of which are major market independent stations) and twelve radio stations. Finally, through subsidiary corporations joint ventures, and its broadcast and cable operations, Cox has been involved in movie and television program production for many years. It has operated Bing Crosby Productions and is currently involved in programs as Entertainment Tonight and Solid Gold.

From a corporate standpoint, Cox has always taken positions which it feels are in the best interest of not only the company, but also the cable and broadcasting industries of which it is a part, and, most importantly, the public interest. As a broadcast licensee, Cox is acutely attuned to the statutory responsibilities which licensee status imposes. As a result, it strives to strike a fair balance in matters which cross industry lines.

I would also add that the diversity of our cable holdings gives Cox a unique perspective. More than most companies, we have learned what it takes to operate big city and small community systems, and to work closely with the franchising entities. In the past few years, the demands of local communities for special services and higher franchise fees have been strong. As a result, many cable firms may be overcommitted, unable financially to meet the demands of the cities and their subscribers. In this regard, there are serious public misconceptions about what it means to operate a cable system. The capital costs are very high, while the financial payout can only be viewed as long term. One cannot enter the cable industry for a "quick fix," the fast profit and exit. Moreover, with municipalities demanding—and receiving—substantial franchise fees, the cable profits are not as large as some believe. For the typical system, franchise fees account for one half of the total profit potential.

I raise these points because while Cox has been a firm supporter and an active participant through its association in cable copyright cmpromise, events in the past few weeks have recast the cable-copyright landscape. Since the Copyright Royalty Tribunal (CRT) voted to increase cable royalties 3.75 percent for each distant signal carried effective January 1, 1983, many cable systems are considering altering drastically their cable services in order to maintain a profitable enterprise. As the standard 5 percent franchise fee consumes about one half of cable profits, an additional 3.75 percent royalty fee could virtually wipe out profits. However, the CRT's order goes even further because the royalty tax is 3.75 percent for each non-grandfathered distant signal carried. Thus, carriage of two distant signals could result in a 7.5 percent tax. Of course, the CRT left an option, albeit a painful one. Cable signals could avoid the new tax altogether by dropping distant signals. For most companies there is no alternative but to eliminate most of all distant signal carriage in order to avoid this new surcharge. There is no middle ground, no other option. In Cox's view, the real loser will be the subscribing public.

As a broadcaster, Cox recognizes the crucial importance of syndicated exclusivity for television licensees and program producers. One of the principal purposes of H.R. 5949 is to restore syndicated exclusivity to the broadcastable marketplace. Television licensees pay substantial sums for the right to broadcast programming and they deserve to be an exclusive outlet in their local territory. Program producers cannot obtain top dollar for their programming if they cannot grant such exclusive rights. Today, when distant television signals are imported via cable, identical programming can run without deletion. As a result, the local station cannot claim to be an exclusive outlet and its television audience is divided. Those licensees that purchased programming and paid for syndicated exclusive rights lost a valuable commodity when the FCC stripped them of their syndicated exclusivity rights. So, in all fairness, Cox strongly supports the restoration of syndicated exclusivity as set forth in H.R. 5949. Even though the bill's syndicated exclusivity protections are more limited than those previously available under FCC rules, Cox believes this proposal is an appropriate compromise which restores the balance Congress envisioned in 1976, when copyright reform was adopted.

Consequently, it is only natural that two issues—passage of H.R. 5949 and overturning of the CRT exorbitant rate increase—be viewed together. The CRT's decision, which was prompted in part by the elimination of syndicated exclusivity protection, must under any circumstance be reviewed because H.R. 5949 restores exclusivity rights for producers and licensees. With this in mind, Cox strongly supports the NAB/NCTA proposal to stay the CRT's order and initiate a new rate proceeding with clear Congressional guidelines. This amendment is essential if the public interest is to be served.

Fundamentally, Cox believes the public interest will be seriously harmed if the new CRT rates are not overturned. As I have indicated, cable operators will be forced to eliminate many distant signals from their cable offerings. The impact is great not only for existing systems but also for new systems nearing operation. For example, Cox's San Diego System would have to pay more than $1 million in added fees just to carry WTBS-TV, Atlanta. In Tidewater, Va., the cable system recently added a "mini-tier," consisting of WOR-TV, New York and WGN-TV, Chicago. This tier is sold to subscribers by July, 1983, Cox would be liable for an additional copyright fee of over $400,000, or $6.50 per subscriber per month—more than twice the cost of the service!

New systems such as our operation in Vancouver, Washington will be particularly hard hit by the increased copyright royalty rates. Although Vancouver is geographically part of the greater Portland metropolitan area, its residents have a natural interest in matters of public and political importance in their home State of Washington. The city, however, receives its principal local television service from the Portland television market. For this community, Cable television affords a unique means of augmenting the small amount of Washington State programming and information carried by Portland stations or available on Vancouver's only television station, a relatively new UHF outlet.

In designing the service package for this system, Cox made special arrangements to meet the needs of Vancouver residents for more Washington-oriented programming by importing five stations from the largest in-state (but for copyright purposes, "distant") Seattle/Tacoma TV market. The opportunity to do this arose as a result of FCC deregulation. If Cox proceeds with this plan, as well as with its intention to further increase program diversity by importing additional distant stations from Atlanta, Canada, Chicago, and New York, the system will end up paying nearly 16 percent of its revenues in copyright royalties, of which over 10 percent (approximately $144,000) will result from carriage of the Seattle-Tacoma stations alone. Compared with the payment of approximately 2 percent the system would have incurred under the former rates, this is an 800 percent increase.

When we projected the operating costs for this system, there was no way to have anticipated a copyright royalty increase of such magnitude. Thus, our financial plans for this system have rapidly become inoperable. At this point, we are faced with the prospect of financial disaster unless diversity of service, and particularly additional in-state service, is reduced.

That the impact of the new copyright rates falls with particular harshness on newer cable systems is further illustrated by the situation in Tucson, Arizona. Although no one would disagree that Tucson is a major city, it is still considered to be a smaller television market for FCC purposes; therefore, it was subject to the most extreme distant signal carriage restrictions under the FCC's former rules. because the FCC's basic minimum signal complement for "smaller markets" did not allow a cable system in Tucson to import any distant independent or network signals, it has only been since the FCC's deregulatory action became final (helped, of course, by the proliferation of nonbroadcast satellite services) that cable has become feasible in Tucson.

As a result of FCC deregulation, our plan for cable service in the City of Tucson could include a diverse complement of programming and TV stations equivalent to that which large capacity cable television systems provided in comparable major cities. Now, however, the CRT's new rate schedule has made economically infeasible that which the FCC rules so recently allowed. This definitely puts Tucson in a disadvantageous position vis-a-vis other communities of its size and stature.

Specifically, importation of the three satellite superstations (WTBS, WGN, and WOR) into Tucson would cost the system 3.75 percent of our revenues each. Based on revenue projections for that community, we anticipate paying nearly $50,000 for each such signal every six months, or a total of $300,000 annually. It is important to remember that this amount is just one component of our program cost, which will include additional copyright fees for Los Angeles and Phoenix stations that can be carried in Tucson because of certain FCC grandfather rights, delivery charges to satellites and microwave carriers, payments for nonbroadcast programming such as movies, news, and entertainment services, and, of course, the programs that we originate locally.

If, because of the staggering increased financial burden, Cox elects not to continue carriage opf these signals after December 31, 1982, it would be the subscribers of the San Diego, Tidewater, Vancouver and Tucson systems that would be the real losers. Even if those subscribers were willing to pay more, there simply is not enough time to secure rate increases from all relevant municipal jurisdictions. Nor is there any assurance that the local governments would approve an adequate fee increase.

In sum, as the Committee can see, Cox's interests are not only with the cable industry, but also with the broadcast and production industries as well. H.R. 5949 has been viewed as an essential compromise to bring the cable/copyright controversy to a close. However, the CRT's rate increase has created a new obstacle to a full settlement of the copyright dispute. We urge this Committee to adopt the NAB/NCTA proposal which would restore a fair balance to the copyright equation and permit the three affected industries to work in a new CRT proceeding to implement a scheme in the public interest.

STATEMENT OF THE NATIONAL INSTITUTE FOR LOW POWER TELEVISION

The National Institute for Low Power Television is pleased to have the opportunity to submit this statement on H.R. 5949, the Cable Copyright and Signal Carriage Act of 1982.

The National Institute for Low Power Television ("The Institute") is an organization devoted to providing the low power television industry with a forum for education and information. The Institute has over 1,000 members. The Federal Communications Commission ("FCC") has issued approximately 140 constructions permits for low power television stations. Almost two thirds of these construction permits have been issued to members of The Institute.

Our comments on H.R. 5949 will be limited to a discussion of Section 201 of the bill, adding a new Section 341 to the Communications Act of 1934. Proposed Section 314(b)(1)(B) would bar the FCC from requiring a cable television system to carry the signal of a low power television station. The Institute believes that the decision whether or not cable television systems should be required to carry the signal of a low power television station is best left with the FCC. Accordingly, The Institute requests that proposed Section 341(b)(1)(B) be deleted from the bill.

Currently, the FCC does not require cable television systems to carry the signal of low power television stations. This FCC decision was adopted as a part of the Report and Order establishing the low power television service. Proposed Section 341(b)(1)(B) would take away the Commission authority to re-examine this decision in the future.

In establishing the low power television service, the FCC determined that this additional broadcasting service would be in the public interest. This new television industry is in its infancy. A statutory provision which will forever bar the FCC from requiring low power television station carriage by cable systems is far too restrictive to apply to the industry at this early stage. The FCC should be permitted to retain the flexibility to establish appropriate regulations to foster the development of the low power television industry as it may deem appropriate. Accordingly, The Institute respectfully requests that proposed Section 341(b)(1)(B) be deleted and that the FCC retain the authority to require, at some future time, the carriage of low power television signals.

STATEMENT OF NEWCHANNELS CORP., METROVISION, INC., AND VISION CABLE COMMUNICATIONS, INC.

I am Robert J. Miron, Executive Vice President of NewChannels Corporation, MetroVision Inc., and Vision Cable Communications, Inc. These companies together provide cable service to over 650,000 subscribers in 18 states in the United States. These companies take the present opportunity to express our views on H.R. 5949 and the current status of cable copyright matters, and to support the NCTA/NAB proposal.

H.R. 5949 is a compromise bill which has the goal of fine tuning the watershed cable-copyright reform enacted in 1976. The legislation has broad support among three principal industry groups, the program production industry, the broadcast industry and the cable television industry. The support for the legislation reflects the genuine effort of these entities to strike a fair and balanced approach to cable copyright matters. The provisions dealing with satellite retransmission of television signals, syndicated exclusivity protection, mandatory cable carriage and the compulsory licensing scheme are a carefully crafted mosaic designed to resolve the cable-copyright debate.

While the proposal was being finalized, a new and disturbing development has thrown the negotiations into turmoil, the decision of the Copyright Royalty Tribunal (CRT) to raise drastically the fees systems must pay for retransmission of distant television signals. As this Committee is well aware retransmission of off-the-air signals has been the mainstay of cable's ability to attract new subscribers. As a result, the CRT's decision to increase royalties under the compulsory licensing scheme, in some cases, tenfold, has materially altered the circumstances under which H.R. 5949 can be evaluated. In our opinion, the CRT's decision fatally undermines a compromise which has been achieved with painstaking effort over the past year. Also, the ruling cavalierly brushes aside the communications policy enactments of the Federal Communications Commission (FCC), which was affirmed by the U. S. Court of Appeals.

By setting itself up to be ultimate arbiter of the desirability of public access to distant signals, the CRT has usurped the role properly vested with the FCC. Clearly, when the FCC determined after a lengthy rulemaking proceeding that distant signal limitations should be dropped, there was no expectation that that ruling would be overturned by a government agency's royalty rate adjustment which would make carriage of distant signals prohibitively expensive. In our opinion, that is exactly what the CRT has done. Unless the ruling is stayed, cable operators will have no choice but to drop distant signals their subscribers have been viewing for years. A few facts about the impact of the CRT's rate change upon the cable systems we operate will show why this course is pre-ordained.

In Binghamton, New York, a system serving 51,000 subscribers, we calculate that the carriage of just one distant signal, WSBK-TV, Boston, will result in an annual increase in royalties of over $230,000. Currently, our major market systems estimate the cost of copyright to be in the range of 4.5 cents per subscriber to 22 cents per subscriber each month. This cost will be increased from 16 cents to $1.58 per subscriber, an average increase of 700 percent.

When the U.S. Court of Appeals for the Second Circuit reviewed the FCC rulemaking determination to eliminate restrictions on the importation of distant signals, it specifically and unequivocally, prohibited the FCC from adopting a new arrangement of "[r]etransmission consents [which] would undermine compulsory licensing because they would function no differently from full copyright liability, which Congress has expressly rejected." *Malrite TV of New York* v. *FCC* 652 F.2d 1140, 1148 (2nd Circ., 1982), *cert denied* ———U.S. ——— 102 S. 1002 (1982).

In adopting the compulsory licensing scheme in 1976, Congress recognized that adjusting its schedule would be required from time to time. In setting the initial fee schedule, however, Congress gave the CRT guidlines for future action, such as the fact of the declining value of added signals means lower royalty rates for additional signals. The CRT has ignored this guidline, setting 3.75 percent of gross revenues as the rate for every distant signal carried.

While the cable industry understood that a rate adjustment was due following the FCC's determination to eliminate distant signal limitations and syndicated exclusivity (and indeed NCTA initiated the royalty rate adjustment proceeding), the ultimate conclusion is so disproportionate to the fair reality that prompt legislative relief is required. Thus, NewChannels and MetroVision strongly support adoption of the NCTA/NAB proposal which would stay implementation of the CRT's rate change and permit a new proceeding to go forward with clear Congressional guidelines.

STATEMENT PALMER COMMUNICATIONS, INC.

I am William Ryan, Vice President of Palmer Communcations, Inc., which owns and operates cable systems in California and Florida as well as broadcast stations in Florida, Iowa, and Minnesota. With involvement in both the broadcast and cable industries for man years, Palmer has a strong interest in the fair and responsible resolution of the cable copyright controversy, which is the subject of the legislation before this Committee, H.R. 5949.

While Palmer has supported the cable-copyright legislation during its evolution in the Congress and anticipated that the agreement reached in the House would effect responsible resolution of the multi-industry controversy, the October order of the Copyright Royalty Tribunal (CRT), raising royalty rates, in some cases tenfold, has dramatically altered the settlement landscape. As a result, Palmer strongly supports the NAB/NCTA compromise proposal which would freeze the current rate status and allow the CRT to reevaluate its rate adjustment in light of clear Congressional guidelines.

Without the respite, cable system operators like Palmer will be forced to make painful decisions which could effect the quality of service to its subscribers for the foreseeable future. An example of how hard the Tribunal's decision will hit subscribers can be seen from our Naples, Florida system. This system currently imports a Miami Spanish language station for selective distribution for no additional monthly charge (just a one-time equipment fee of $25.00), to several hundred Spanish speaking customers. Although the service is extremely popular among this very small but important group of our subscribers, the majority of our 30,000 total subscribers do not receive it.

Although the matter is subject to interpretation, the Copyright Office takes the position that we should pay for this station as though it were distributed to all 30,000 subscribers. Under the new rates, carriage of this station alone would entail a semi-annual copyright cost of nearly $7,000 or $5.83 per month for each subscriber who receives it.

Our Naples system is also engaged in an expansion of general services and has considered adding distant superstations available by satellite. Although FCC deregulation now permits us to do this, at a copyright cost of 3.75 percent of our revenues per signal (nearly $57,000 each) we are naturally reluctant to do so.

Hence, the CRT's order could immediately adversely affect tens of thousands of cable subscribers. Palmer asks this Committee not to let the loss of service happen. We strongly urge adoption of H.R. 5949 with the NAB/NCTA proposal.

STATEMENT OF SAMMONS COMMUNICATIONS, INC.

I am James N. Whitson, President of Sammons Communications, Inc. and I Welcome this opportunity to present our views to the Committee, Sammons is a multisystem cable operator, with more than 50 systems operating in over 20 states in the United States. We are one of the nation's oldest and largest cable operators. Therefore, we view the legislation pending before this Committee as vital to the interests of cable television and the public we serve. Our support for legislation, however, has been severely tempered by the recent decision of the Copyright Royalty Tribunal (CRT) to raise royalty rates for cable systems to unconsciencable levels. The CRT's order has thrown the cable television industry into a state of turmoil, with the likely result that the subscribing public will receive drastically reduced service after January 1st. Thr recently crafted proposal offered this Committee by NCTA and NAB, which would stay implementation of the Tribunal's order pending the CRT's conducting a new rate adjustment proceeding in light of the legislative reform contained in H.R. 5949, now is the essential linchpin to maintaining the viability of this compromise.

Sammons' support for the legislation is premised upon the fair and equitable treatment of all parties with regards to the cable copyright controversy. As originally fashioned, the legislation would provide not only the cable television industry, but the broadcast and motion picture industries with relief each deems necessary to restore equity in their dealings. However, the CRT's October 20, 1982, order placing a surcharge of 3.75 percent of gross revenues on each distant signal carried would have the wholly expected result of causing cable systems to drop distant signals. The decision, thus, materially and adversely impacts upon the ability of the cable industry to serve its constituency.

At the same time, the Order effectively usurps the communications policymaking authority of the Federal Communications Commission, which has long encouraged cable systems to expand distant signal importation. The Commission's orders to the effect have been reviewed and affirmed by the U.S. Court of Appeals. While the Senate in S. 2172 has recognized the desirability of expanding signal carriage with suitable program protection, the CRT has rejected that guidance and has instead chosen a course which is designed to force distant signals off cable systems. Indeed, the Chairman of the Tribunal, in public comments after the order was announced, indicated he expects cable systems to drop distant signals rather than pay the added royalties. Thus, the new rate structure has been drawn to implement a communications policy crafted by the Tribunal, not the Congress or the FCC.

In Sammons' case, the course we must take is painfully clear. For example, in Harrisburg, Pennsylvania, our system which has been delivering WTBS-TV, Atlanta, for some time, could be hit with an $87,000 surcharge. Similarly in Bristol, Tennessee-Virginia, we project a ten-fold increase in royalties for retransmitting WOR-TV, New York and WGN-TV, Chicago. If the Order stays in effect, we will have no choice but to drop these signals. In Pleasantville, New Jersey, our cable system is planning to add the signals of WTBS-TV and WGN-TV, which are currently available via the satellite to cable systems around the country. However, as a result of the CRT's rate change we are seriously considering dropping those plans. Presently, the Pleasantville system pays 1.8 percent of its gross revenues to the Copyright office in royalty fees. If these two new signals are added under the CRT's adjusted rate standards, the system would owe 10 percent of its gross revenues in royalties, over a 500 percent increase. Similarly, a cable system in Dover, New Jersey, which has paid $46,500 semi-annually would find its rates increased 60 percent if it added one distant signal, and 100 percent if two distant signals were added. Cable operators throughout the country are finding that the impact of the rate change is of similar or even greater dimensions.

As a result, Sammons urges this Committee to preserve the Cable-copyright compromise by adopting the NCTA/NAB stay proposal.

STATEMENT OF WILLIAM TURNER, PRESIDENT, WELCH ANTENNA CO.

My name is William Turner. I am president of Welch Antenna Company. I operate two small cable television systems in West Virginia. The system in Welch, West Virginia has about three thousand subscribers, and the one in Wayne and Lavalette, West Virginia, has about one thousand subscribers.

I am respectfully submitting these written comments in opposition to the adoption of H.R. 5949, the Cable Copyright and Signal Carriage Act of 1982.

In 1976, the Congress determined that cable television systems should have a statutory license to carry the signals of television stations authorized by the Federal Communications Commission. Cable television system operators pay copyright royalties for such "secondary transmissions" under a system established by the Copyright Act of 1976.

In 1981, The Federal Communications Commission repealed regulations providing for blackouts by cable television systems of syndicated programs and for restrictions on the number of "distant" signals which could be carried by cable television systems. The FCC found, after years of study, that the public interest did not justify those regulations.

In October of this year, the Copyright Royalty Tribunal announced new, additional royalties which must be paid for signals and programs affected by the FCC's deregulatory action. Thus, owners of copyrighted programs will be fully compensated by cable television system operators for their endeavors.

The Bill before you now will throw a monkey wrench into a mechanism that has just begun to work. The Bill is the result of negotiations among special broadcast, cable television and motion picture interests. Somewhere along the way, the public's interest was left out.

I ask you if you have really read this Bill? If you have read it, did you understand it? For example, do you understand Section 341(e)(3) regarding the carriage of religious broadcast stations?

In the House floor debate, Congressman Sawyer called this Bill "a real turkey." He pointed out that it is opposed by the administration, by the Chairman of the FCC, by the Register of Copyrights, and by the Justice Department. The reasons for these different people opposing the Bill are wrong, in my judgment, but they are surely justified in opposing it.

I am not sure that I understand all of the ramifications of this Bill. I think the Bill should be used in Law Schools as an example of how not to draft legislation. I would suggest that ninety percent of the people who read this Bill, unaided by a lawyer, would not have the foggiest idea of how to comply with it. On that ground alone, it ought to be buried and a stake driven through its heart.

This Bill makes distinctions between the types of programs which are subject to different regulations. Syndicated series programs are one thing, syndicated movies are another, religious programs (disguised as "nonentertainment" commercial programming excepting sports programming) are a third, and sports programs (apparently limited to intercollegiate football games in some cases and professional sports event in others) are still another. I always thought that the Bill of Rights forbade regulation of free speech and press, and forbade the establishment of religion. Do not let anyone deceive you about this Bill and these regulations being "content neutral." They are not.

There are other problems with this Bill. The proposed Section 341 of the Communications Act would require detailed regulations of which broadcast signals must be carried, and where they must be carried. These "must carry" provisions are bad law.

The "must carry" rules are obsolete and if this Bill is passed, those rules will give a broadcaster, good or bad, a license to take, in my case, one-twelfth of my cable system capacity in Wayne, West Virginia, or at minimum the right to use any cable television company's property for distribution of its signal without any just compensation. In West Virginia a television broadcast station, WVAH, 30 miles from Wayne, just came on the air with, in my opinion, much less desirable programming than several satellite channels presently carried. The station demanded carriage at the expense of either WGN Chicago, WTBS Atlanta, Cable News Network, Christian Broadcast Network, or Nickleodeon. I say at the expense of these stations because my system is a twelve-channel system, all channels of which are full, and in order to add this so-called local station I must drop one of the other services. If we were to make this change, we estimate it will cost us approximately $882,000 to expand the system initially and $5,000 per year operating expenses.

Occupation of one-twelfth of my system's property to the exclusion of other uses is no less a taking of property than the taking of a landlord's property which was prohibited by the Fifth amendment as recently interpreted by the U. S. Supreme Court in *Loretto* v. *Teleprompter Manhatten CATV Corp.*, 50 L.W. 4988 (June 30, 1982).

According to this Bill, if and when my system reaches 3,000 subscribers, we will be forced to provide "syndicated exclusivity" for up to five stations, within our market area. In order to protect these stations from competition, we will have cut off up to one-third of all the programming now carried on WTBS Atlanta and WGN Chicago. We estimate the cost of switching equipment will be approximately $25, 000 initially and $15, 000 per year for programming and maintenance. This does not even take into account the loss of revenue due to subscriber dissatisfaction and inconvenience. Most subscribers like to be able to choose what they want, when they want it, which selections come from services such as WTBS, CNN, ESPN, Nickelodeon, etc. I would also like to call to your attention the difficult situation the cable operator finds himself in: on one hand we are expected to provide service to sparsely populated areas that are not economically profitable, yet we try to serve these residents. On the other hand it seems that everyone (i.e. government, broadcasters, etc.) either wants to regulate away any choice we have regarding how we run our businesses or they want part of our profits. It seems to be "open season" on cable systems. Like any other business, if we don't provide our subscribers with quality service we won't have a business. No one understands cable better than the cable operator and their subscribers, and if left with leeway, the competitive market place will make everyone do a better job.

The sports blackout amendment will also be devastating if kept in this Bill. Can you imagine at any given day or week, twelve of the major cities in the United States being blacked out from any major league baseball game being played. For example, if the Atlanta Braves and Los Angeles Dodgers are playing in Atlanta, not only is that game blacked out within 35 miles of Atlanta but no other major league game would be shown in the Atlanta market. By the same token, eleven other major markets will be affected the same way. In other words, a complete sports blackout nation wide, except for sparsely populated communities like Welch, West Virginia, which will be allowed to carry all televised major league games. That is, assuming that there will be a station naive enough to carry the games just for small minority communities, like Welch. If you will put yourselves in the place of the consumer or the cable operator, I'm sure you will see the havoc which will be created.

May I suggest that you conduct field hearings on this Bill in West Virginia, Arizona and Oregon to get the consumers' viewpoint on this Bill. Ask the proponents of this Bill to explain it to cable subscribers in Holyoke, Massachusetts, and get their reaction to the Bill.

Remember, in 1976, cable television systems were not required to pay copyright royalties at all. It was because we didn't pay royalities that the FCC imposed distant signal restrictions and syndicated program blackouts. Now we pay royalities and the television tycoons, movies moguls and sports Barons also want to limit distant signals and blackout programs by regulatory and economic means.

You are being asked to adopt legislation which means that the public will receive television programs only on the terms that big businessmen set. Under no circumstances should you let that happen.

Thank you.

STATEMENT OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Mr Chairman and Members of the Committee, I am President of the Motion Picture Association of America, Inc. (MPAA), whose members are the major producers and distributors of theatrical and television programs in the United States. Attached is a list of these companies. The position set forth in this statement, which I am submitting for the record, is made on behalf of the Association and its member companies.

MPAA has supported the general concepts embodied in H.R 5949, and continues to support this bill.

MPAA does have serious reservations about two provisions in the bill which have been inserted into the measure whithout any prior consultation with us and were never even discussed as part of the compromise agreement negotiated by MPAA, the National Association of Broadcasters (NBA), and the national Cable Television Association (NCTA) in which I participated and which was agreed to by the parties in October 1981. This agreement was the genesis of the bill before you, H.R. 5949, which amends the Copyright Act of 1976 and the Communications Act of 1934. I have urged the House Judiciary Committee; its Subcommittee on Courts, Civil Liberties, and the Administration of Justice; and the House Subcommittee on Telecommunications, Consumer Protection, and Finance to adhere to the concepts agreed to in the compromise agreement. I must say in all candor that it must be regretted that has not been done by including in the bill the provisions which I shall now mention.

THE SUPERSTATION EXEMPTION

The so-called "Ted Turner superstation exemption" embodied in Sec. 104(b) of H.R. 5949 is a dramatic departure from the consensus agreement approved by MPAA/NAB/NCTA and concurred in by the House Judiciary Subcommittee when it initially reported this legislation on December 16, 1981.

The superstation exemption, as I stated to the Kastenmeier Subcommittee in my testimony of December 8, 1981, is a bizarre and unjustified "grandfathering" of Ted Turner's Atlanta station, WTBS, and is totally outside the scope of the compromise agreement. Indeed, this superstation exemption is absolutely contradictory to the basic design and intent of the agreement's syndicated exclusivity provisions. In my testimony of December 8, 1981, I urged the Kastenmeier Subcommittee not to de facto amend television program contracts; not to grant rights other than those acquired in the competitive marketplace and incorporated in licensing agreements; and not to grant special privileges relating to the retransmission of copyrighted programs by superstations that are different from those affecting the retransmission of the same or similar programs by all other stations.

THE EASTERN MICROWAVE AMENDMENT

MPAA is strongly opposed to Sec. 101(a) of H.R. 5949 which deals with 17 U.S.C. 111 (a) (3). This provision was inserted in the bill by the House Judiciary Committee to overturn the March 1981 Federal district court decision involving Eastern Microwave. That court decision, which has now been reversed by the Second Circuit Court of Appeals, held that the satellite "resale carrier" of the programs broadcast by television station WOR in New York City is not a "passive" provider of transmission facilities which qualifies for the copyright exemption provided in Section 111 (a) (3) of the Copyright Act of 1976. The lower Federal court found that Eastern Microwave is engaged in the marketing of a program service for which it receives substantial revenues, and is therefore liable to the owners of the copyrighted works that it performs. The case is now on appeal to the U.S. Supreme Court.

MPAA believes that it is wholly inappropriate for Congress to exempt totally from liability a profit-making use of copyrighted works. The Eastern Microwave provision was inserted in H.R. 5949 without any hearings on the issue and thus precluded any opportunity for copyright owners to formally present their objections and concerns to the members of the House Judiciary Subcommittee.

My concerns of these two provisions were brought to the attention of the House Judiciary Committee prior to its reporting of H.R. 5949.

CONCLUSION

I thank Chairman Kastenmeier of the House "Copyright" Subcommittee has done the most that he could do under a leaky political tent. When I appeared before the Kastenmeier Subcommittee on December 8, 1981 to testify on this legislation, I pledged to abide by the decisions made during that subcommittee's markup of this bill. I abide by that commitment, because the time has come to go on from here to the next and more important issues of preserving the American copyright. Copyright is to the future of programming what Walter Bagehot said of the British cabinet system: "The hyphen that joins, the buckle that fastens." If networks and stations are to have a continuing stream of valuable films and television entertainment programs to broadcast to their viewers, copyright cannot be abused.

I strongly urge the Senate Commerce and Judiciary Committees to reject any plea for a special grant of privilege for any individual or television station.

I pray the the committees will speedily make its decisions to protect the welfare of the television community and the viewing public.

ATTACHMENT A

The ten major producers and distributors of theatrical and television programs in the United States comprise the membership of the Motion Picture Association of America, Inc. These companies are: Columbia Pictures Industries, Inc.; Embassy Communications; Metro-Goldwyn-Mayer Film Co.; Orion Pictures Corp.; Paramount Pictures Corp.; Twentieth Century-Fox Film Corp.; United Artists Corp.; Universal Pictures, a division of Universal City Studios, Inc.; Walt Disney Productions; and Warner Bros. Inc.

NATIONAL PUBLIC RADIO,
Washington, D.C., November 22, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In the near future, the Committee on Commerce, Science and Transportation will review H.R. 5949, the cable copyright legislation. Of particular interest to National Public Radio and its member stations is Section 103(b), which resolves a longstanding inequity in the current ability of public radio stations and NPR to receive a fair royalty for the radio programs used by cable.

The public radio amendment is noncontroversial, and has received no objections from any of the major parties to H.R. 5949: The National Cable Television Association (NCTA), the Motion Picture Association of America (MPAA), or the National Association of Broadcasters (NAB). The amendment was unanimously supported by the House Judiciary and Energy and Commerce Committees. I very much hope the Judiciary/Commerce Committee will endorse Section 103(b) during its deliberations.

H.R. 5949 represents a compromise among cable and copyright holders. The question of cable's retransmission of radio signals, however, had been ignored until NPR brought it to the attention of the House Judiciary Committee in 1981. In its testimony, NPR documented the following:

(1) Cable radio service is a substantial part of cable operations. Nine out of ten cable companies—and virtually 100 percent of larger cable systems—offer radio service to their subscribers.

(2) Although many of these services involve simply the retransmission of radio signals picked out of the air (with—to be sure—enhanced sound quality), 40 percent of all cable systems carefully select certain distant radio signals for retransmission and some import specific signals by microwave relay. By all of these methods, cable systems retransmit thousands and thousands of distant radio signals. Over 64 percent of all cable systems offering any radio service carry NPR signals, while over 54 percent retransmit distant NPR stations. Of all instances of the retransmission of NPR signals, over 77 percent were on a distant basis.

(3) Distant cable systems import NPR signals because public radio provides distinctive and consistently excellent programming. Public radio stations broadcast classical, jazz, bluegrass and contemporary music, along with drama and in-depth, long-form news and live events coverage not found on commercial radio. Although 85 percent of all commercial radio signals fall into one of five all-musical, uniform formats, public radio programming provides a diverse range of alternative listening choices. In short, public radio is carried as extensively as it is on distant cable systems because of its innovative and diverse programming—services that are largely unavailable from commercial radio.

Although the 1976 Copyright Act does provides for radio to receive a portion of the cable royalties collected by the Copyright Royalty Tribunal, NPR has been largely unable to collect the amounts to which it is entitled. This problem may be traced to three causes:

(1) Cable operators are not required by the Copyright Office to report which of their radio signals are distant, even though they must report that data for television signals. As a result, there is no source of information concerning the extent of distant radio retransmission. The burden thus falls to the radio claimants, such as NPR, to perform expensive annual surveys of all cable radio services to support their claims.

(2) Under the Copyright Act, copyright owners are compensated only for distant retransmission by cable systems. But the FCC's rules are unclear as to what constitutes a distant radio signal, leaving the Tribunal to sort out conflicting definitions and the copyright claims derived from them. The Tribunal, however, has been unable to resolve these issues.

(3) There is no guidance in the statute for the distribution of royalties between radio and television claimants.

Due to these problems, the Tribunal did not award any royalties at all to NPR after the 1978 cable royalty proceeding. The United States Court of Appeals vacated that decision with respect to NPR, however, and remanded for further proceedings. Nevertheless, the Tribunal still did not award NPR any funds after further review. In the 1979 proceeding, NPR was accorded a scant .25 percent of the fund. As of this date, NPR's claims from 1980 are being adjudicated before the Tribunal.

H.R. 5949 resolves these inequities for public radio. Section 103(b) of the bill provides that copyright owners of programs broadcast on public radio shall receive at least $300,000 per year in compensation for distant retransmission of their works. Section 103(b) also provides that the Tribunal shall adjust this payment, as warranted, every three years.

I hope you will concur that this is a reasonable solution to a difficult problem, and that the Committee will support this provision during its consideration of H.R. 5949.

Please call if I can answer any questions, or provide you with additional information on this issue.

With kind regards, I am

Sincerely,

FRANK MANKIEWICZ, *President.*

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,
New York, November 23, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR SENATOR PACKWOOD: We understand that in December your Committee will be considering proposed legislation (H.R. 5949) regarding Section 111 of the Federal Copyright Act (17 U.S.C. § 111) and the compulsory license for cable television systems.

Our Committee has conducted a year-long study of this issue and has concluded that the compulsory license created by Section 111 for cable television systems should be abolished. It is the view of our Committee that there is no longer a sufficient overriding public interest to exempt cable television companies from full copyright liability. Radical changes in the cable television marketplace since 1976 necessitate a reexamination of the factual underpinnings that justified the enactment of Section 111. In our view, the cable television industry has outgrown its infancy and is no longer in need of a Congressional subsidy.

Beyond the specific issues raised by Section 111, our Committee is concerned that Congress too heavily relies on the views of commercially interested parties when resolving broader policy questions dealing with intellectual property protection. We urge the Congress to formulate standards that permit government intervention in the marketplace only when compelling state interests of the general public are involved. As a general rule, our Committee questions the propriety of Congress providing compulsory licenses in purely commercial matters where the marketplace is capable of setting a fair price for the use of copyrighted work and where the parties involved are not really in need of governmental intervention to protect their interests.

I am enclosing for your consideration a copy of the Memorandum Report prepared by our Committee. If you or members of your Committee would like any additional information regarding the position of our Committee, please feel free to call upon me.

Respectfully submitted,

ROBERT H. MONTGOMERY, Jr.

Enclosure.

MEMORANDUM REPORT

This Report was prepared by the Committee on Entertainment and Sports Law of the Bar Association of the City of New York (the "Committee", hereinafter). It addresses specific legislation pending before the Ninety-Seventh Congress [1] as well as substantial public policy issues involving existing and potential grants of special statutory exemptions and compulsory licenses in the Federal Copyright Act (17 U.S.C. § 101, *et seq*).

After conducting a year-long inquiry with respect to the curent review of Section 111 by the Congress, the Committee has concluded that the compulsory license created by that statute should be adbolished. At most, there should be a very limited exemption from full copyright liability for such smaller cable systems as might qualify under the guidelines reflecting the purpose of Section 111 when it was enacted, and even such exemption for smaller systems should be phased out over a period of, at most, five years.

The recommendations are based upon our analysis of what does and does not constitute a valid public interest sufficient to curtail the rights of a copyright holder. The Committee acknowledges that concerns of the general public must, at times, be balanced against those of individual authors and inventors. However, the private financial interests of copyrights owners are advanced by the creation of a statutory property right in intellectual creations. This is done in order to advance the larger interests of the public's access to diversified works of authorship (literature, television or motion picture programming, musical creations and the like). Article I, Section 8 of the Constitution sets forth this fundamental policy for copyright protection.

When Congress or the courts affirmatively curb the scope of property interests protected by copyright, there should be some overriding "public interest" to justify such a limitation. Intrusions upon copyright protection disminish the very incentives to intellectual creation that the Constitution recognized as essential. The short-term result of such diminution of property rights may be to make the creations otherwise subject to copyright available, in whole or in part, at a lower price to the public (or free), but the long-range result of such restrictions may be likely to discourage creation by reducing the creator's incentives to produce. This may be seen most dramatically in industries such as filmed entertainment programming, where the "production expenses" of creation involve multi-million dollar investment risks and strong odds against recoupment of the costs of any given work and where governmental intervention serves only to increase these financial uncertainties.

Our conclusions and recommendations are set forth as follows. In Part I of the Report we will very briefly outline what we believe to be the salient history of compulsory licenses under American copyright law. In Part II we will focus, again briefly, on the proceedings to revise Section 111 of the Federal Copyright Act (17 U.S.C. § 111), in light of this discussion. Finally, in Part III, we will make our recommendations concerning the conduct of future inquiries with regard to these, and perhaps other similar, matters.

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[1] H.R. 5949; H.R. 3560; H.R. 3528; H.R. 3844 and S. 2172, as revised.

I. THE HISTORY AND POLICIES UNDERLYING COMPULSORY LICENSES IN THE UNITED STATES COPYRIGHT LAWS

A. The 1909 Act

The 1909 Act (previously 17 U.S.C. § 1, et seq.) contained only one explicit grant of a compulsory license by the Congress. Section 1(e) of that Act, in pertinent part, provided that:

> . . . And as a condition of extending the copyright control to [reproduce mechanically the musical work] that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof . . .

The legislative history of this provision indicates that it was enacted through fear by the Congress that, absent its provisions, there would emerge "a great music monopoly" (H. Rep. No. 2222, 60th Cong. 2d Sess., pp. 6E–12).

B. Interim Developments Prior to 1976 Act

As the 1909 Act had specifically excluded by definition certain types of uses of copyrighted material (see the "jukebox" exemption in section 1(e), for example, H. Rep. No. 2222, 60th Cong., 2d Sess. p. 12) from the scope of protection under the federal act, so too the courts over the following decades also reduced or exempted from protection the rights of copyright owners to assert claims to revenues from various uses of material subject to copyright.[2]

C. The 1976 Act

The Copyright Revision of 1976 (17 U.S.C. § 101, *et seq.)* contained sweeping revisions of the 1909 Act. It (1) responded to technological changes in the media communicating intellectual property, (2) incorporated judicial limitations on the exploitation of rights by copyright owners and (3) enacted special provisions stemming from the intensive lobbying efforts of various industry groups.

While this new federal law accomplished changes that were long overdue (unifying the copyright system nationally and drawing the United States closer to worldwide standards of protection for intellectual property), it also codified significant erosions of the rights of copyright owners. Where the 1909 Act contained a single compulsory license for musical mechanical licenses, the 1976 Act contained thirteen provisions specifically limiting the Congressional grant of rights in Section 106.[3]

Each of these sections (§§ 107–118; 602) indicates the intrusion of the government into the competitive marketplace in order to set rates, or to exempt, in whole or in part, the use of materials otherwise within the scope of protection under Section 106 of the Act. The efficacy of such governmental dictates will be examined in Part III of this Report. This Report will now examine the pending revision to Section 111 as a "case history" of what the Committee perceives to be a disturbing trend in the Congress' approach to revisions of the Federal copyright law.

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[2] Most notable among these limitations in this context were two Supreme Court decisions, *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp.* v. *Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974). Using techincal interpretations of the Copyright Act concerning what constitutes a public performance, these decisions, and others like them in different areas of the law, carved out large exceptions to the rights protected by copyright. Relying as they did on legal interpretations alone, as is the essential duty of the judiciary, these decisions failed to address the underlying public policy issues concerning why exceptions to rights in intellectual property should be created in the first place. This is, fortunately, a very appropriate function for the Congress to undertake.

[3] § 107: general "fair use" exemption; § 108: library and archive reproduction; § 109: "first sale" doctrine; § 110: non-profit performances and performances for blind and handicapped persons; § 111: exemption of certain secondary transmissions of signals by cable systems; § 112: right to make copies or the ephemeral recordings of certain transmissions; § 113: limitations on rights in pictorial, graphic and sculptural works; § 114: limitations on rights in sound recordings; § 115: provision setting compulsory license royalties; § 116: juke box exemption from performances; § 117: computer program and systems limitations; § 118: use of works in non-commercial broadcasting; and § 602: importation exemptions

Some of these "erosions" had been made by the courts over the years and others (for example, § 109, stating the § 27 "first sale doctrine" of the 1909 Act, and § 116 requiring the payment of some—though not marketplace level—compensation to copyright holders) did involve restatements of or improvements upon pre-existing law. However, the overall impact of these sections was certainly not the expansion of the scope of protection for owners of copyrighted works.

II. LEGAL, ADMINISTRATIVE AND LEGISLATIVE BACKGROUND OF COMPULSORY LICENSE FOR CABLE TELEVISION

A. The Background to Section 111: Compromise I

In 1909 no form of television transmission existed. Thus, that Act did not specifically address the use of television programming. The *Fortnightly* and *Teleprompter* decisions, *supra* at note 2, interpreted the 1909 Act as not providing copyright protection for programming on over-the-air signals that were picked up and retransmitted by cable systems.

In addition, there was a federal administrative backdrop to the 1976 Act. There were comprehensive regulations of the Federal Communications Commission ("FCC") relating to the cable industry, including the following (which appear to have been the most important ones bearing on the provisions of Section 111):

1. Limitation on distant signal importation (as a general rule, no more than two independent (non-network) signals could be imported, subject to variations based upon broadcast stations the signals of which were otherwise available in the cable systems' markets).
2. Syndicated exclusivity rules (no duplication by imported signals of programming available via broadcast station in the market into which the signal would be imported).
3. "Must carry" rules (requiring cable systems to include over-the-air broadcast signals available in those systems' markets as part of the channels of the system).

These FCC regulations were clearly intended to operate in tandem with the requirement of the compulsory license.[4]

Perhaps most critical to the passage of Section 111 was the state of the cable industry when the Section 111 compulsory license was enacted. There appeared to be at least four basic "factual underpinnings" justifying the subsidy provided by Section 111: (1) limited availability of alternate non-broadcast programming choices for individual cable systems; (2) relatively small subscriber bases connected to cable television systems; (3) ownership of cable systems primarily by smaller, dispersed corporations; and (4) importation of distant signals primarily on a regional level, with satellite transmission of distant signals not yet a technological fact of life.

Given the status of the cable industry on the one hand, and the strong views of the program owners on the other, the Section 111 compulsory license grew out of a bitter struggle involving intensive lobbying. As Copyright Register David Ladd has described it, this provision was the compromise of: [t]he legislative deadlock [that] continued until 1976 when representatives of the cable television and program supply industries jointly recommended to Congress terms and conditions specifying the extent of copyright liability governing cable transmissions. These terms and conditions form the essential elements of the cable television provisions of the Copyright Revision Act of 1976.[5]

The avowed public purpose in allowing such industry-drafted legislation[6] was to provide a compromise that would allow a "new" industry to grow from its infancy[7] with the recognition that new programming outlets were being made available to the public.[8] It implemented this purpose in Section 111 by doing the following:

1. Established compulsory license for cable systems and exempted passive common carriers from copyright liability for providing the signal necessary for cable systems' secondary transmissions.

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[4] Letters of November 26, 1979 and March 13, 1980 from Congressman Robert W. Kastenmeier to FCC Chairman, Charles Ferris.

[5] Cable Television in the U.S.A., 29 J. COPR. SOC'Y, pages 246, 253, Item 341 (1982).

[6] Wholly apart from the issue of whether industry-drafted legislation is appropriate is the difficult issue of whom the "industry spokesmen" should be. The text of the 1976 compromise was negotiated among three major industry organization: the National Cable Television Association (representing certain cable exhibitors; the interests of smaller cable systems are thought by some to be more represented by the CATV Association); the National Association of Broadcasters (representing broadcast exhibitors) and the Motion Picture Association of America (representing primarily motion picture distributors.) However, the majority of programming for broadcast television, cable and theatrical release also involves the interests of writers, directors performers, composers and many others who are not principally represented by any of the three "industry" organizations doing the bargaining. Thus, the compromise was fashioned to favor even narrower interests than might appear upon initial examination.

[7] As Register Ladd went on to say, "[t]he recognition of the copyright owners' right to be compensated for the use of their works included in cable retransmissions removed a critical legal barrier to cable's development and provided increased financial stability to the industry." Id.

[8] Copyright Law Revision, Committee on the Judiciary, H.R. No. 94-1476, 94th Cong., 2d Sess. (1976), at 88.

2. Created statutory compulsory license fees to be paid by cable systems, based upon revenues attributable to basic subscriber receipts and number of signals imported.

3. Established Copyright Royalty Tribunal to divide fees among applicants on the basis of methodology to be determined by Tribunal, and authorized Tribunal to increase fee payable by cable systems (a) in the event of changes in FCC rules and (b) to adjust for inflation.

As will be discussed below, the equities that relied heavily on the status of the cable industry and the state of the relevant technology have shifted in favor of program suppliers (and away from cable systems) in the intervening six years.

B. Developments Since the 1976 Compromise

Since the time of the 1976 Act, the FCC Rules mentioned above have all been either eliminated or substantially revised in the name of "deregulation" but, as in generally recognized, in favor of the cable industry's interests. See also, *Malrite* v. *FCC*, 652 F. 2d 1140 (2d Cir. 1981), *cert. denied sub. nom., National Association of Broadcasters* v. *FCC*, ——— U.S. ———, 102 S. Ct. 1002 (1982).

A review of the industry's expansion and financial health also indicates that Congress' intention that the cable industry grow and prosper has been very successfully realized. Considering the factual underpinnings outlined above we observe the following.

First, the compromise was set against a technological setting of regional microwave "leapfrogging", not nationwide access to programming via satellite. It was not until after the compromise was reached that HBO launched its initial satellite delivery to relay programming on its pay service. Close to a dozen such commercial multi-channel communications satellites have since been put in orbit.[9] Among other things, this has enabled the signals of so-called "superstations" to be disseminated throughout the United States (1) at great profit to common-carrier "middlemen" (not merely cable systems), (2) at increased profit to the station operators (no longer "passive" or "reluctant", but aggressively selling to their advertisers on the basis of the increased viewership attributable to cable subscribers), and (3) without fair marketplace compensation to the copyright owners of this programming.

Second, current industry surveys place cable subscribership well over 20 million households and project that by 1990 the subscriber base for cable systems will be almost 60 million of the estimated 94 million homes.[10] As confirmation of this, the July 11, 1982 New York Times reports that cable television subscription revenues totalled $3.3 billion in 1981 and are expected to reach $4.4 billion in 1982. In 1981, revenues from cable-originated advertising added an additional $129 million. Paul Kagan Associates reports the dramatic growth of the industry in the following charts:

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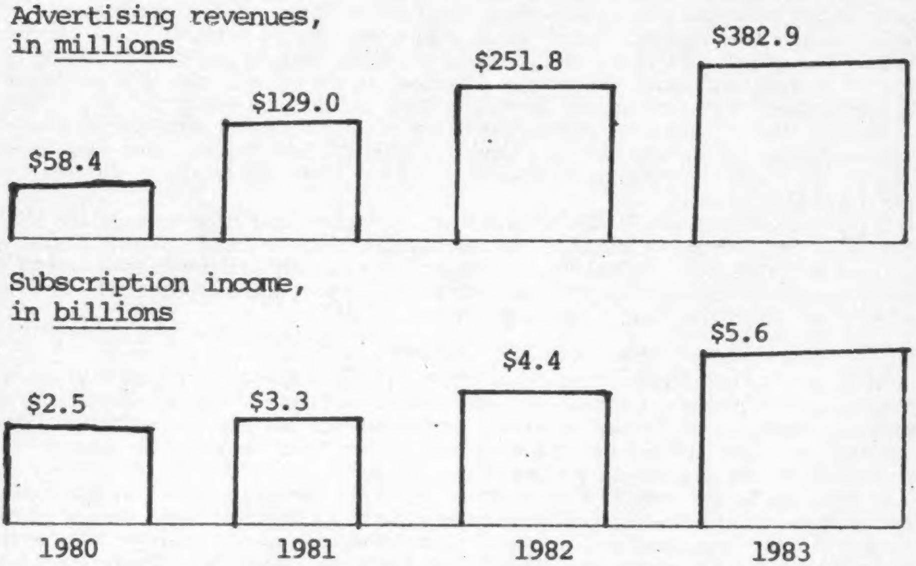
[9] Communications Satellites and the Law, 27 BULL. COPR. SOC'Y, pages 325-326, Item 600 (1980). The Comsat, RCA and Western Union satellites alone have 216 transponders that are or will be dedicated to satellite delivery of cable programming. CableVision Magazine, August 2, 1982, p. 68.

[10] Cablevision Magaziine, June 28, 1982, p. 93.

HOW THE INDUSTRY HAS GROWN



Third, the smaller CATV type systems that existed at the beginning of the 1970s have changed in size and character since the time of the compromise. The fact is that the fifty largest MSOs (Multiple System Operators) own 40 percent of the 4,800 cable systems, and these cable systems account for approximately 75 percent of all cable subscribers.[11]

Fourth, the companies owning these systems—not coincidentally—have changed radically from the time when the compromise was initially passed by Congress. As an example, the following ten major companies are reported to have the following subscriberships: [12]

Rank as of May 31, 1982

	Subscribers
Tele-Communications Inc.	1,900,000
American Television and Communications (Time Inc.)	1,900,000
Group W Cable (Westinghouse and Teleprompter)	1,710,425
Cox Cable Communications	1,131,981
Storer Cable Communications	1,000,115
Warner Amex Cable Communications	943,500
Times-Mirror	691,225
Newhouse Broadcasting	628,802
Rogers UA-Cablesystems	610,874
Viacom Cablevision	561,206

It would appear, excluding perhaps the older and smaller capacity cable systems, that cable is a giant business today and in financial good health.[13]

Fifth, at the time of the 1976 Act, conventional over-the-air television signals were the primary source of programming for cable systems. While pay television networks such as HBO were beginning to enter the marketplace, they were very limited in their coverage and, as their balance sheets indicated, not successful alternatives for product. It took the advent of satellite distribution to prepare the way for the cornucopia of alternate programming now available to cable systems. No fewer than 25 advertiser-supported basic cable services are now operating or announced, all available to cable systems either free or by payment from the service to the cable operator. At least eight pay services complement to array of basic programming available.[14] Almost 30 additional satellite-fed cable programming services have announced their intention to enter the field.[15] Thus, "pay" services supported by subscriber revenues or "basic" services supported by advertising alone, provide programming options that exceed the total available channel capacity possessed by the 12 channel and many other cable systems. At the time of the 1976 Act, most systems relied on distant signals for virtually all of their non-mandatory signal programming. Today, this programming insofar as it involves satellite-delivered "superstations", may account for no more than 3 of almost 35 program choices—less than 10 percent. Thus, the reliance on distant signal programming by the cable industry has diminished greatly.

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[11] Cable TV Programming, June 7, 1982, p. 2.

[12] Cablevision, July 26, 1982, p. 111.

[13] The FCC News Release of Report No. 17084, issued on July 16, 1982, further confirms this conclusion. In it, the FCC proposed elimination of rules prohibiting television network ownership of cable systems, perceiving that cable is no longer in need of such protection.

These radical changes in the marketplace lead the Committee to conclude that although the "factual underpinnings" for Section 111, discussed on page 7 above, may have justified the initial "underwriting" or "subsidy" of the cable industry's development by the Congress (or, more accurately, program suppliers), these facts no longer exist in the current industry climate.

C. The Background on Compromise II

At the beginning of this Congress, program suppliers approached the Congress requesting full copyright liability for cable retransmissions of distant signals. This proposal was generally referred to as "retransmission consent." Essentially it requested that fair marketplace negotiations, rather than Section 111, govern the price paid for use of programming by cable systems.

In addition to the industry representatives of the program suppliers, numerous public representatives supported this general concept. Among others, the following have strongly urged the Congress to eliminate the compulsory license for cable in favor of a free marketplace for programming: Clarence James, Past Chairman of the Copyright Royalty Tribunal; David Ladd, Register of Copyrights; Henry Geller, Past Head of the National Telecommunications and Information Administration; Robert A. McConnell, Assistant Attorney General, United States Department of Justice; Bernard J. Wunder, Jr., Assistant Secretary for Communications and Information, National Communications and Information Administration, U.S. Department of Commerce; Mark Fowler, the Chairman of the Federal Communications Commission.

Other academic opponents of continuing the compulsory license have also been drawn to the attention of Congress.[16]

Despite the comprehensive and carefully detailed reports or positions cited above, the Congress has elected to again walk down the path of fashioning an industry-drafted compromise[17] that would codify essentially the Federal statutory and administrative status quo as of the time of the 1976 Act. In pursuing the apparently singleminded purpose of achieving a compromise, it is the opinion of the Committee that the Congress has focused almost exclusively on its desire for an industry resolution rather than the reasons for continuing a compulsory license.[18] In so doing, the various recommendations noted above have been almost entirely ignored, as have the changes in the marketplace outlined herein.

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[14] Cable TV Programming, June 11, 1982, p. 3.

[15] CableVision Magazine, January 18, 1982, p. 79.

[16] See, e.g., Besen, Manning & Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J. Law & Econ. 67 (1978); Shooshan & Jackson, Inc., Cable Copyright and Consumer Welfare: The Hidden Cost of the Compulsory License (1981); Brotman, Cable Television and Copyright: Legislation and the Marketplace Model, 2 J. Comm. & Ent. Law 477 (1981).

[17] A so-called "cable-copyright compromise" was passed by the House of Representatives on September 28, 1982, and is scheduled to be the subject of hearings before the Senate Commerce and Judiciary Committees. The "compromise," principally among the National Cable Television Association, the National Association of Broadcasters, and the Motion Picture Asscoiation of America, includes among other things, the following:

1. Compulsory license for an unlimited number of distant signals.
2. Reimposition of certain syndicated exclusivity provisions (with exceptions for systems located outside television markets, systems with fewer than 3,000 subscribers and other systems "grandfathered" under 1972 FCC Rules).
3. Codification of FCC's "must carry" rules, with exemptions for lightly viewed signals on systems with 36 or fewer activated channels.
4. Retention of current cable copyright fee schedule.
5. Legislative overruling of the District Court decision in *Eastern Microwave v. Doubleday Sports*, 534 F. Supp. 533 (N.D.N.Y. 1982), *reversed*, ———F. 2d———(2D Cir. 10/13/82) (Exempting resale common carriers from copyright liability).
6. Specifically requested/negotiated industry benefits (NCAA, Radio, Religious Broadcasters).

As with any legislation negotiated by industry groups, the "compromise" itself is being questioned by other industry groups (low power television, hispanic programmers and sports), asserting that they were excluded from discussions or that their interestss were not fairly dealt with.

III. CONCLUSIONS AND OBSERVATIONS

As stated above, the Committee's specific recommendation is that the Section 111 compulsory license should be abolished and that the so-called "copyright compromise" should be rejected by the Congress. If, upon elimination of the compulsory license, there were particular cable systems that could demonstrate that the considerations underlying the initial enactment of Section 111 justified the continuation of the compulsory license with respect to them, the Committee is of a view that such limited exemptions might be justified—perhaps for a "phase-out" period of five years. A prototype for such exemption might be a geographically isolated, small, privately-owned cable system serving a marketplace that did not realistically have the programming options discussed in this Report.

However, beyond the specific issues raised by Section 111, the Committee questions the efficacy of the Congressional approach when dealing with intellectual property protection (i.e. looking almost exclusively to commercially interested parties when resolving broader policy questions).

We strongly urge the Congress to formulate standards for determining the existence of a public need sufficiently compelling that it justifies the creation of any such special exemptions or limitations on the rights of copyright holders. See generally, *Home Box Office* v. *FCC*, 567 F. 2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (discussion of the appropriate role of Federal administrative bodies in setting marketplace standards for competitive release of television programming).

Article, I, Section 8 of the Constitution recognizes the public interest in creating incentives for authors and inventors, which incentives depend upon economic rewards in the marketplace. Limitations on these incentives should be carefully restricted to those areas where strong overriding public interest is involved. As the Ninth Circuit recently articulated in *Universal City Studios, Inc.* v. *Sony Corporation of America*, 659 F.2d 963 (9th Cir. 1981), cert. granted, ——— U.S. ———. 102 S. Ct. 2926 (1982);

Despite what is said in some of the authorities that the author's interest in securing an economic reward for his labors is a "secondary consideration," it is clear that the real purpose of the copyright scheme is to encourage works of the intellect, and *that this purpose is to be achieved by reliance on the economic incentives granted to authors and inventors by the copyright scheme. This scheme relies on the author to promote the progress of science by permitting him to control the cost of and access to his novelty.* (Italic supplied) *Id.* at 965.

An evenhanded protection of access to materials by disadvantaged persons such as the handicapped, the disabled, or similarly-situated persons should clearly be within the purview of the public interest. In this regard, we look to Section 110 as an example of what we believe is the proper type of exemption from the Section 106 exclusive rights in copyright. Moving up the continuum, special copyright exemptions for educational and other eleemosynary organizations, while at least in some instances more capable of providing some compensation to the copyright holder, still involve government-compelled access to private property for some larger societal purposes.

What this Committee questions is the propriety of Congress providing compulsory licenses in other purely commercial matters. This is especially so where the current marketplace appears to be capable of setting a fair price for the use of the copyrighted work and where the parties involved are not really in need of governmental intervention to protect their interests. The government usually does this by setting an artificially low level of compensation for the use of the work or indeed total exemption from copyright liability for its use. While a number of limitations on exclusive rights in copyrights were noted in footnote 3, there are three [19] pure "compulsory licenses" in the present Act: for cable television; for phonorecords; and for coin-operated phonorecord players.[20]

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[18] In fairness, it should be noted that there were a number of strong dissents filed to the reporting out of H.R. 5949 on May 17, 1982. Congressmen Railsback, Mazzoli, Sawyer, Butler, Frank and Lungren all expressed various opposing views to the majority's recommendation. It is hoped that these comments will be given proper weight in any future considerations of this measure.

[19] The alternative provisions of § 118 might cause it also to be regarded as compulsory in nature.

As a result of the decision in *Universal v. Sony, supra,* another pure compulsory license in the form of royalties for the sale of video (and perhaps audio) recorder machines and blank tapes is also being considered by the Congress.[21]

The trend of governmental intervention into the marketplace is clear and growing. It is the view of this Committee that the Congress should consider taking a step back to reexamine the overall policy issues underlying this type of governmental "bargaining" for private parties. It is our view that this should occur only when compelling state intersts of the general public are involved. This was certainly the policy in 1909.

It is the Congress that should be making these evaluations. The courts are not charged with this function, and repeatedly defer to the legislatures to exercise this judgment.

As Mr. Leonard Feist stated in his May 21, 1979 address to the Annual Convention of the Copyright Society of the U.S.A.: From 1965 on, there were no spokesmen from the Copyright Bar who dealt objectively with the practical, equitable and philosophical aspects of copyright law . . . Except for the testimony and resolutions mentioned just now, all the other pages of the printed record of all the hearings relate to the specific positions of clients . . . [the] revision may very well have been the golden age of the copyright client. As things worked out, it was copyright itself which desperately needed to be treated as a client with the best of professional services, representation, advocacy.[22]

We urge the Congress to re-evaluate the underlying policy reasons to granting any compulsory license, in Section 111 or elsewhere, when the issue arises in the future. It is the public that should be served by creating such provisions, not merely clients, and the public need should be clearly defined and assessed before it is utilized as a basis for subsidizing any one industry or group at the expense of another.

Respectfully,

ROBERT H. MONTGOMERY, JR.,
Chairman, Committee on Entertainment and Sports Law
of the Bar Association of the City of New York.

Dated: November 23, 1982.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS,
Washington, D.C., November 29, 1982.

Hon. ROBERT PACKWOOD,
Chairman, Senate Committee on Commerce, Science, and Transportation,
Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR PACKWOOD: On behalf of the League of United Latin American Citizens (LULAC), this nation's oldest and largest Hispanic organization with over 100,000 members in 45 states, I am writing in opposition to H.R. 5949 (the cable copyright bill) which is the subject of hearings before your committee and the Committee on Judiciary Friday, December 3.

LULAC's oppostition to this bill is focused primarily upon the provision which requires cable systems to carry local television broadcast signals only if they receive "a 1 percent share of viewing hours in the non-cabled television households in the county where the system is locted or a 2 percent share of viewing hours in all television households in such county." At first glance, this provision would appear to be sound and justifiable. However, the type of media surveys required by this provision have historically undercounted Hispanic households. To be assured of accuracy, a Spanish lanuguage station would have to conduct its own local surveys, which would be a financial impossibility.

We are also concerned that there seems to have been an oversight with regard to the Spanish community when the above provision was written. Spanish language television stations appeal to those who can understand the language, but not to the entire viewing audience. Without a provision to detetmine audience measurement from the Spanish language universe of a community only, this measurement standard will not be an accurate reflection of the station's popularity among those who can enjoy its programs. Unless the oversight is rectified, the syndicated and independent Spanish language stations in this nation will be in jeopardy, as will the programming diversity which should be ensured by a bill such as this.

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[20] It should be mentioned that the second and third of these were "carried over" from the 1909 Act with only the most minimal consideration as to their public policy justifications (see *supra,* page 3).

[21] The Committee notes, in passing, that while home taping of copyrighted works without compensation to program owners is not justifiable, this area appears unregulable consistent with privacy interests of citizens and pragmatic considerations. Therefore, as an exception to its general rule, the Committee would be open to the possibility of a compulsory license and blanket royalty in this context. This would at least provide some workable means of compensation in an area where there might otherwise be none.

[22] 26 BULL. COPYR. SOC'Y, page 443, Item 1068 (1979).

Spanish language television is essential to the Hispanic population in this country as a source of news, information and entertainment. Hispanics rely upon Spanish television to enhance their abilities to contribute as responsible citizens. If Spanish stations are forced to compete for priority within the overall viewing community, they are thus being forced to prove themselves capable of meeting the needs and desires not only of their targeted viewers, but of the entire television audience. This inequitable demand overlooks the vital role Spanish television has to play in American society in reaching out to the nation's twenty million Hispanic inhabitants.

We at LULAC urge you to seriously consider the impact H.R. 5949 will have on Spanish television and its contribution to the Hispanic community, as well as to overall cultural diversity in television. We hope these concerns will be broadly discussed in the hearings, and that equitable provisions for Spanish television broadcasting will be developed as a result.

Respectfully Submitted,

TONY BONILLA,
LULAC National President.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Jefferson City, Mo., December 1, 1982.

Hon. BOB PACKWOOD,
Chairman, Senate Committee on Commerce, Science, and Transportation,
Russel Senate Office Building, Washington, D.C.

DEAR SENATOR PACKWOOD: As President of the National Collegiate Athletic Association ("NCAA"), I am writing to express the strong support of the NCAA and its member institutions for H.R. 5949, Section 401 of which contains needed, yet limited, protection for colleges and universities against cable retransmissions of a special kind of college football telecast. Our position is set forth more fully in my November 23 letter to Senator Goldwater, chairman of the Senate Subcommittee on Communications (copy enclosed). I hereby request that that letter, along with this letter, be included in the record of hearings on H.R. 5949 scheduled for December 3, 1982.

We believe that H.R. 5949 is important legislation and we hope that the Senate Committee on Commerce, Science, and Transportation soon will complete action on the bill so that it can be adopted in this Congress.

Sincerely,

JAMES FRANK, *President.*

Enclosure.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Jefferson City, Mo., November 23, 1982.

Hon. BARRY M. GOLDWATER,
Chairman, Subcommittee on Communications,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN GOLDWATER: As president of the National Collegiate Athletic Association ("NCAA"), I am writing on behalf of the 959 NCAA member colleges and universities, allied collegiate conferences, associate institutions, and affiliated organizations to express our strong support for H.R. 5949.

The nation's colleges and universities long have sought protection against uncontrolled cable retransmissions of their sports event telecasts, in the contexts of both copyright and communications legislation, in order to prevent demonstrable damage to in-person attendance at concurrently conducted games of sister college institutions. Section 401 of H.R. 5949 provides needed protection against cable retransmissions of a particular kind of college football telecast—specifically, live, nonnetwork television broadcasts of regular-season games. For many years, retransmissions of these telecasts have been a special problem, because they limited the ability of the colleges to authorize the telecasts.

We were able to suggest a legislative solution to this limited problem that did not harm the interests of others, and that solution has been incorporated in H.R. 5949.[1] The bill's provisions, although much more limited than the protection we would have considered ideal, and warranted, therefore, go a long way toward resolving the concerns of NCAA member institutions. Section 401 will increase the colleges' access to broadcast television and the availability of college football to the television-viewing public, without disadvantaging cable systems.

H.R. 5949 is legislation that addresses complex issues requiring timely resolution. It represents an effort to compromise conflicting interests and strongly held positions of a number of interested parties. Although all parties have had to make concessions, it is a successful compromise—one that we support.

The NCAA, therefore, encourages the Communications Subcommittee and the full Commerce, Science, and Transportation Committee to act favorably on this important piece of legislation. We hope that action will be taken in this Congress. We request that this expression of our support be included as part of the hearing record.

Sincerely,

JAMES FRANK, *President.*

U.S. DEPARTMENT OF COMMERCE,
THE ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION,
Washington, D.C., December 8, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Cable television copyright legislation passed by the House in September (H.R. 5949) is pending Senate action. The Administration strongly opposes enactment of this intensely regulatory legislation and I am writing you to urge your support for our position.

If enacted, H.R. 5949 would reimpose regulations on the cable television business that were lifted as part of previous efforts to deregulate. The bill would also place new regulations on broadcasters that were specifically rejected by the Federal Communications Commission during the Ford Administration. Most importantly, H.R. 5949 would entrench an artificial regulatory scheme governing cable television copyright notwithstanding the availability of deregulatory, marketplace alternatives.

The Departments of Justice and Commerce, the Chairman of the Federal Communications Commission, and the U.S. Copyright Office all have strongly opposed favorable consideration of legislation along the lines of H.R. 5949 at every stage in the proceedings for nearly two years. I believe strongly that H.R. 5949 constitutes fundamentally flawed legislation and that its passage would be inconsistent with the Reagan Administration's deregulatory policies and initiatives in this field.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the President's program.

Sincerely,

BERNARD J. WUNDER, JR.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., December 9, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is intended to convey to you and to other members of the Senate the Department of Justice's strong opposition to H.R. 5949, the so-called Cable-Copyright bill. I have previously advised Chairmen Rodino and Dingell of the House Judiciary and Energy and Commerce Committees, respectively, of our opposition to this bill.[1]

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[1] The protection that H.R. 5949 affords the colleges in this respect is sharply focused and very limited. It is different from and far narrower than the limitation on cable retransmissions of professional sports events sought by the professional sports organizations and clubs.

[1] See Letters from Robert A. McConnell, Assistant Attorney General, to Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary (Mar. 20, 1982), and John D. Dingell, Chairman,

Continued

Our opposition to H.R. 5949 is based on two grounds: first, it perpetuates the regulatory mechanism for determining rates for cable carriage of copyrighted broadcast programs; and second, it codifies syndicated exclusivity and distant signal rules which were recently eliminated by the Federal Communications Commission ("FCC").

Continued reliance on the regulatory mechanism for allocating copyright royalties is unwarranted: experience under the current system indicates that the Copyright Royalty Tribunal (CRT) is incapable of approximating market prices for broadcast programming imported by cable systems, and thus, in the context of the cable television industry, is clearly unnecessary. This regulatory approach to determining the value of programming, assessing cable systems and collecting charges from them, and distributing revenues among copyright holders has proven intractable. Disputes among claimants of royalty fees have resulted in protracted and costly hearings and litigation.[2] The CRT's inability to achieve a marketplace outcome reduces economic efficiency by preventing copyright holders from creating the optimal amount of programming and cable systems from importing the optimal number of broadcast signals.

There is no justification for granting cable television special treatment under the copyright laws not afforded any other video distribution technology. The Department believes that the CRT should be replaced with a system of full copyright liability, phased-in over a reasonable period. Under a system of full liability, copyright holders and cable operators would be able to negotiate—either directly or through programming brokers—royalties reflecting a market determination of the value of the copyrighted works being shown. Such a system would ensure the optimal levels of program production and importation of broadcast signals by cable systems, while eliminating the administrative costs associated with the CRT.

In addition, H.R. 5949 would statutorily mandate certain regulations, including the so-called syndicated exclusivity and distant signal importation rules. Although these regulations would afford copyright holders more control over their product than presently available, they would impose substantial regulatory burdens on broadcasters and the FCC.

Accordingly, we wish to apprise you of our strong opposition to H.R. 5949 in the hope that your Committee will again demonstrate the leadership it has shown in deregulating those segments of our economy that are competitive and capable of performing optimally without government regulation. Knowing that you share the Administration's commitment to reducing unnecessary economic regulation, I urge you to reject H.R. 5949.

The Office of Management and Budget advises that there is no objection to this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell,
Assistant Attorney General.

U.S. Department of Justice,
Office of Legislative Affairs,
Washington, D.C. June 17, 1982.

Hon. John D. Dingell,
Chairman, Committee on Energy and Commerce,
U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the views of the Department of Justice ("Department") on H.R. 5949, a bill to amend sections of the Copyright Act of 1976 relating to copyright liability of cable television operators for carriage of television broadcast signals, as well as sections of the Communications Act of 1934. For the reasons set out in our letter of March 20, 1982 to the Honorable Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, discussing H.R. 3560 ("March 20 letter," attached hereto), the Department recommends against enactment of H.R. 5949. We believe that H.R. 5949 unnecessarily imposes costly and inefficent regulations, when a system of full copyright liability, adopted after a suffi-

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House Committee on Energy and Commerce (June 17, 1982), attached hereto. H.R. 5949 was amended subsequent to these letters; however, it does not vary materially from the version previously discussed.

[2] Ironically, several proponents of H.R. 5949 have recently argued that H.R. 5949 should be amended to include a provision staying the CRT's latest rate adjustment ruling. See Broadcasting, Dec. 6, 1982, at 37-38.

cient period of transition, would be fully capable of allocating compensation for copyrighted works.

I. THE PROPOSED LEGISLATION

H.R. 5949 is identical to H.R. 3560 in all but a few respects. It retains those provisions of Section 111 of the Copyright Act, 17 U.S.C. § 111, requiring copyright holders who license their programming to a broadcaster to grant licenses to any cable system retransmitting the broadcast signal. Cable systems compensate copyright holders by paying a percentage of their gross revenues, based on the number of signals imported, into a fund that is distributed by the Copyright Royalty Tribunal ("CRT"). If a controversy arises over distribution claims, the CTR is empowered to adjudicate the dispute and distribute the fund. 17 U.S.C. § 801(b)(3). The CRT is also charged with adjusting fee schedules. 17 U.S.C. § 801(b)(2).

In addition to retaining Section 111 of the Copyright Act, H.R. 5949 includes several provisions intended to restore to copyright holders some of the control over programming that compulsory licensing takes away. This legislation would codify "syndicated exclusivity rules" allowing broadcast stations to protect their exclusive exhibition rights to certain programming, as discussed in greater detail in the March 20 letter. Broadcasters could compel cable systems to black-out programs by giving them notice of protected programming. Section 101(d). In addition, the legislation would codify Federal Communications Commission ("FCC") rules giving network affiliates protection against imported network signals that simultaneously duplicate their programming. Section 201. Finally, it would codify FCC rules requiring blackouts of certain local football games broadcast on imported signals and would thus afford certain protection to broadcasts of NCAA football games. Section 401.

H.R 5949 would also codify, in modified form, the FCC's "must carry" rules that require cable systems to carry the signals of certain broadcast stations in the systems' service areas. Moreover, H.R. 5949 would exempt from copyright liability and entity that retransmits broadcast signals and has no control either over the content of these retransmissions or their ultimate recipients. This provision is intended to ensure that satellite resale carriers are not subject to copyright liability. Section 101(a).[1]

II. DISCUSSION

As stated in our March 20 letter, the Department believes that H.R. 5949 unnecessarily substitutes a complex regulatory scheme for the marketplace, and is likely to reduce the efficiency and productivity of the television programming and distribution industries.

Proponents of compulsory licensing advance two major points in support of their argument that full copyright liability would be unworkable. First, it argued that without compulsory licensing, copyright holders would "boycott" cable systems and refuse to license any programming to them. In fact, copyright holders have no economic incentive to withhold their product from any entity willing to pay the market price. We have seen no evidence that the market for sale of television programming is not generally competitive. Moreover, cable programming services have been quite successful in obtaining rights for high quality programming without the benefit of compulsory licensing.

The second major argument is that costs of requiring cable systems to negotiate for every program on every signal carried would prohibit a market from operating efficiently. The Department believes that, in response to full copyright liability, private arrangements to economize on the costs of negotiating retransmission rights would likely develop. For example, program brokers might contract for rebroadcast rights of all programs carried on a broadcast signal, and distribute the signal to cable systems via satellite. In addition, the large multiple system cable operators ("MSOs") would be able to realize substantial economies in negotiating on behalf of all their systems. Thus, as discussed above and in more detail in the March 20 letter, the Department finds no merit in the arguments that the marketplace could not function efficiently in this area.

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[1] Satellite resale carriers lease satellite transponders for the purpose of transmitting television broadcast signals to cable systems that provide the signals to their subscribers. This provision was adopted in response to a recent decision involving Eastern Microwave, Inc. ("EMI") and the owners of the New York Mets baseball club. Eastern Microwave, Inc. v. Doubleday Sports, Inc., No. 81-CV-303 (N.D.N.Y., Mar, 12, 1982) (appeal docketed). In that case the court found EMI to be liable under the Copyright Act for retransmitting to cable systems via satellite Mets games broadcast on WOR-TV, New York. *Contra* WGN Continental Broadcasting Co. v. United Video, 523 F. Supp. 403 (N.D. Ill. 1981) (appeal docketed).

Therefore, the present compulsory license tends to undercut the economic goal of the copyright laws—to provide financial incentives to produce new works. The result may be a reduction in the supply of creative works. Moreover, the present system unfairly singles out one television distribution technology—cable television—for preferential treatment under the copyright laws.

The fundamental shortcoming of the system perpetuated by H.R. 5949 is that it fails to allow television program suppliers to capture full market value of their programs. Instead, it continues to rely on the Copyright Royalty Tribunal ("CRT") to establish royalty fees for secondary broadcast transmissions of cable systems. Experience under the current system suggests that the formula used by the CRT to prescribe royalty fees assessed cable systems is arbitrary and incapable of approximating market prices. Moreover, disputes among claimants of royalty fees have resulted in protracted and costly hearings and litigation.

Recognizing the harm caused by the present scheme, H.R. 5949 includes several provisions aimed at mitigating the compulsory license's harmful effects on copyright holders. The Department believes that these regulations, which include syndicated exclusivity, network nonduplication, and sports programming rules, are an inadequate solution to the problems caused by compulsory licensing. Although the regulations would afford more control over programming, they would not allow copyright holders to capture full market value. Furthermore, they would impose substantial regulatory burdens on broadcasters and the FCC.

Finally, the satellite video resellers provision added to H.R. 5949, which would overrule the *Eastern Microwave* decision holding video resellers subject to the copyright laws (see note 1, *supra*), would magnify the harm to copyright holders resulting from compulsory licensing. By eliminating the copyright holders' ability to prevent satellite distribution of their product, the provision would allow wider distribution to cable systems, thereby increasing the financial impact on copyright holders and decreasing incentives to produce new works.

CONCLUSION

For the reasons discussed above and set out more fully in our letter of March 20, the Department of Justice recommends against enactment of H.R. 5949.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely yours,

ROBERT A. MCCONNELL,
Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., March 20, 1982.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter presents the views of the Department of Justice ("Department") on H.R. 3560, reported out by the Subcommittee on Courts, Civil Liberties and the Administration of Justice ("Subcommittee") on December 16, 1981. The bill would amend sections of the Copyright Act of 1976 relating to copyright liability of cable television operators for carriage of television broadcast signals, as well as sections of the Communications Act of 1934. For the reasons set out below, the Department of Justice recommends against enactment of H.R. 3560. We believe that compensation for use of copyrighted material is better determined by the marketplace, under a system of full copyright liability after a sufficient period of transition, rather than by the costly and inefficient regulatory mechanism envisaged by H.R. 3560.

I. THE PROPOSED LEGISLATION

While H.R. 3560 would retain those provisions of present Section 111 of the Copyright Act, 17 U.S.C. § 111, that mandate compulsory licensing to cable television systems for retransmissions of broadcast programming, it would also make several significant changes, as discussed below.

A. Syndicated Program Exclusivity

Until they were repealed in 1980, Federal Communications Commission ("FCC") rules protected broadcasters in the top 100 markets from cable importation of syndicated programming.[1] H.R. 3560 would impose syndicated program exclusivity provisions that are broader than the FCC's former rules. It would allow broadcast stations to protect their exclusive exhibition rights to syndicated programming by giving notice of the programs to cable systems in their markets. Moreover, all broadcast stations could require cable systems to delete all series programs.[2] Independent stations could each require deletion of 300 motion pictures, and network stations could require deletion of 100 motion pictures per quarter from cable programming. Title I, Section 1(d).[3]

Implementation of these rules would be delayed for six months for cable systems in the top 50 television markets; one year for systems in markets 51-100, and two years for all other cable systems. Title I, Section 4.[4]

B. Network Nonduplication

FCC rules presently require that cable systems delete, from imported distant network signals, programming that duplicates the programming of a local boadcast network affiliate.[5] H.R. 3560 would codify these rules, with a minor modification to make clear that cable systems may not import network programs from one time zone into another and show them before air times scheduled by local affiliates. Title II, Section 1(b).

C. Sports Programming

FCC rules presently prohibit cable systems located within 35 miles of a sports team's games. The rules do not cover cable systems with fewer than 1,000 subscribers; games broadcast locally, or signals that system imported before March, 1972 when the rules first went into effect. 47 C.F.R. § 76.67. H.R. 3560 would codify the FCC's rules governing retransmission of sports broadcasts by cable systems.

Moreover, H.R. 3560 would add a provision stating that cable systems would be unable, without specific copyright approval, to exhibit non-network broadcasts of intercollegiate football games between September 1 and the second Saturday in December. Title IV.[6]

D. "Must Carry"

FCC rules presently require cable systems to carry the signals of all television broadcast stations located within 35 miles of the cable system or designated as "significantly viewed" in the county where the cable system is located. 47 C.F.R. § 76.59.[7] H.R. 3560 would codify these rules, but with several modifications. Under

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[1] Syndication is the licensing of non-network, non-live programming to television broadcasters in more than one market. 47 C.F.R. § 76.5(p). The FCC's rules gave broadcasters in the top 50 television markets the right to prevent cable importation of syndicated programming, whether or not that programming was actually carried by a broadcaster in these markets. In markets 51-100 protection was given only to programs actually carried in the market. No protection was given outside of the top 100 markets. *See* 47 C.F.R. §§ 76.151-.161 (1979) (repealed 1980). The Commission eliminated its syndicated exclusivity rules in 1980. Cable Television Syndicated Program Exclusivity Rules, Report and Order, 79 F.C.C.2d 663 (1980), *aff'd*, Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3535 (Jan. 12, 1982).

[2] A "series" is a group of two or more works involving the same individual or with substantially the same cast of principal characters or a continuous theme or plot. 47 C.F.R. § 76.5(q). Systems unable to receive broadcast television, or with fewer than 3,000 subscribers, would be exempted from these requirements.

[3] No station could claim exclusive rights to a single motion picture in more than two quarters per year.

[4] Systems unable to receive broadcast television, or with fewer than 3,000 subscribers, would be exempted from these requirements. Signals that were grandfathered under the FCC's 1972 syndicated exclusivity rules or had already been granted waivers under the FCC's syndicated exclusivity rule would also be exempted. The FCC's rules grandfathered all signals that were carried at the time the rule was adopted. Cable Television Report and Order, 36 F.C.C. 2d 143, 185 (1972). In addition, the FCC could grant exemptions to the rules in cases where the different signal was already available in the market of the broadcaster seeking exclusivity.

[5] There are exceptions for stations in the Mountain Time Zone where affiliates carry network programming at widely varying times. 47 C.F.R. § 76.92-.99.

[6] However, if the cable system is less than 120 miles from a VHF station, or less than 45 miles from a UHF station, it can exhibit the game pursuant to the compulsory licensing scheme of Section 111.

[7] FCC regulations define "significantly viewed" stations as those receiving a minumum of 3 percent of total viewing time spread over 25 percent of all non-cable households. 47 C.F.R. §§ 76.5(k), 76.54; Cable Television Report and Order, 36 F.C.C. 2d 143, 170-76 (1972).

H.R. 3560 cable systems with 36 or fewer channels in use could choose not to carry any television signal with an audience of less than a 1 percent share of non-cable viewing or less than a 2 percent share of all television viewing in the system's market. No cable system would be required to carry subscription television signals or signals of any station going on the air after November 1, 1981. Systems would be required, however, to carry signals of up to two noncommercial educational stations within whose Grade B contour they were located, unless the stations simultaneously duplicated 100 percent of their instructional programming and 40 percent of their other programming. Title II, Section 1(a). [8]

E. Satellite Carriers

Satellite carriers presently operate as common carriers and lease satellite transponders for the purpose of transmitting television broadcast signals to cable systems that provide the signals to their subscribers. In light of the syndicated exclusivity provisions of H.R. 3560, the bill would permit satellite carriers to black out certain satellite-delivered programming subject to those provisions; [9] and to substitute programming without obtaining consent of the signal originator. Title I, Section 1(a). Moreover, the syndicated exclusivity rules would not apply to signals delivered to cable systems via satellite transmission when the broadcaster acquired contract rights before enactment of H.R. 3560 and the broadcaster has given the system written notice that it may carry the program. Title I, Section 4(b).

DISCUSSION

H.R. 3560 creates a complicated regulatory framework as a substitute for market allocation of copy righted programs. As we demonstrate below, the Department of Justice believes that this complex regulatory approach is unnecessary, and is likely to have the effect of substantially reducing the efficiency and productivity of the cable television industry and other entertainment media.

A. Rational for the Current Scheme

The goal of copyright laws is to give authors control over use of their products thereby providing financial incentives to produce new works. Without such protection against unauthorized use, the author may be unable to capture sufficient value of creative products to make their creation worthwhile. Thus, the result may be a reduction in the supply of creative works. The fundamental shortcoming of H.R. 3560 is that it fails to allow television program suppliers to capture the full market value of their programs. Instead, it retains the present compulsory licensing scheme that requires a government agency—the Copyright Royalty Tribunal ("CRT")—to fix prices for secondary broadcast transmissions by cable systems.

The Copyright Act of 1976 requires cable systems to pay a percentage of their gross revenues, based on the number of signals imported, into a fund that is distributed to copyright holders by the CRT. If a controversy arises over distribution claims the CRT is empowered to adjudicate the dispute and distribute the fund. 17 U.S.C. § 801(b)(3). The CRT is also charged with adjusting fee schedules. 17 U.S.C. § 801.(b)(2). The Copyright Act prevents cable systems, broadcasters, and program suppliers from negotiating directly for rights to carry signals at market prices. Cable systems currently have the right to import whatever signals they want, regardless of the wishes of copyright holders. As a result, the give and take of the marketplace that could set efficient prices for retransmission rights is preempted. Since there is no evidence suggesting that a market in retransmission rights would fail to perform efficiently, we believe this government pricing scheme is unwarranted.

Two principal arguments are advanced in support of the present compulsory licensing arrangement. The Department believes these arguments do not support retention of the present compulsory licensing scheme.

First, several witnesses before the Subcommittee argued that without compulsory licensing, copyright holders would "boycott" cable systems and refuse to license any programming to them.[10] We have seen no evidence, however, that the market for television programming is any thing but competitive. To the contrary, several studies have found that the market for syndicated programming—the largest category of programming covered by the compulsory license—is highly competitive.[11] Copyright owners have no economic incentive to withhold their product from any entity willing to pay a competitive market price. For example, networks such as Home Box Office, Showtime, and The Movie channel that provide programming to cable systems have been quite successful in obtaining rights to major films in advance of any showings on television networks. There is no reason that other cable programming distributors would be unable to do the same for a great range of products.[12]

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[8] Systems required to carry noncommercial stations under this provision could choose not to carry an equivalent number of network stations that substantially duplicate signals already carried by the system.

[9] To fall within this provision, a program would have to be subject to blackout requirements under syndicated exclusivity by over 50 percent of the cable systems receiving the satellite-distributed signal.

[10] *See, e.g.,* testimony of Barbara Ringer, former Register of Copyrights (June 25, 1981), at (9; testimony of Thomas Wheeler, President, National Cable Television Association (May 22, 1981), at 8.

Second, it has been argued that the costs of requiring cable systems to negotiate for every program or every signal carried might prohibit markets from operating efficiently. This argument formed an essential part of the rationale advanced for adoption of present Section 111.[13] If, however, the costs of negotiating the rights to use particular programs on individual cable systems are high, private arrangements to economize on these costs might be feasible for cable systems unable to afford individual negotiations. For example, under full copyright liability, middlemen might contract for rebroadcast rights from copyright holders, package the programming, and distribute it to cable systems via satellite. The major pay television networks are examples of this type of distribution.[14] Moreover, the costs of negotiating for programming would be offset to some degree by elimination of the cost of lengthy and cumbersome administrative proceedings before the CRT, appeals of CRT decisions, and delays in distribution of royalty payments under the present scheme.

In addition, when Congress in 1976 accepted the negotiation costs argument, it was widely believed that most of the cable television industry was struggling and too small to negotiate in an open marketplace for distant signals. Thus compulsory licensing was a form of "subsidy" to insure that cable would be able to obtain programming. However, the industry's size and financial strength have increased dramatically since 1976.[15] Large companies with substantial financial resources, such as Westinghouse, Time, Warner-Amex, and Times-Mirror are now major participants in the industry,[16] and these companies are capable of negotiating for distant signal programming.[17]

Indeed, since 1976 cable television has become a major source of original programming. Cable systems have proven themselves capable of negotiating for and obtaining programming from the multitude of basic and pay services that have developed since the initiation of satellite distribution of programming.[18] This fast-growing cable programming industry gives cable operators an abundance of programming alternatives to distant signals not available in 1976. The ability of the new cable networks to obtain programming under full copyright liability evidences the ability of the marketplace to set license fees in this industry.

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[11] *See* FCC Network Inquiry Special Staff, Analysis of Television Program Production, Acquisition and Distribution June 1980, at 237–40, and sources cited therein.

[12] Furthermore, assuming a competitive market for television programming, no inefficiency would likely result if some programming is priced so high that cable programming distributors cannot purchase it.

[13] The House Report on the 1976 Copyright Act stated that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted for cable systems. *See* H. Rep. No. 94–1476, 94th Cong., 2d Sess. 89 (1976).

[14] The recent NTIA study of this issue discusses in detail alternative mechanisms that could develop to reduce transactions costs under a full liability system. *See* U.S. Department of Commerce, National Telecommunications and Information Agency, *Cable Copyright: Alternatives to the Compulsory License* 63–82 (1981) ("NTIA Report").

[15] In 1976 cable systems served 11.6 million subscribers, industry operating revenues totaled about $999.7 million, and net income before taxes totaled about $57 million. In 1980, cable systems served about 16.9 million subscribers, industry operating revenues totaled about $2.2 billion, and net income before taxes totaled about $168 million. FCC Cable Television Bureau, Research Division, release Feb. 1, 1982. As of October 1980, the 25 largest cable systems represented over 60 percent of all basic cable subscribers, approximately 10.6 million households. In addition, the three largest cable systems held about 20.5 percent of the cable market with over 1 million subscribers each. *See* testimony of David Ladd, Register of Copyrights (April 29, 1981), as Chart 4.

[16] The top 10 cable multiple system operators serve 9.6 million homes, approximately 44 percent of the industry total. The top 25 companies serve 13.4 million homes; approximately 61 percent of the total. Broadcasting, November 30, 1981, at 36–37.

[17] The desirability of granting subsidies to small cable systems is a policy issue beyond the scope of this analysis. Imposition of industry-wide compulsory licensing, however, appears to be an extremely inefficient way to provide such a subsidy, because it singles out retransmission of over-the-air broadcsts to the exclusion of other types of programming.

[18] Nine pay services and 25 basic services are presently available to cable systems. At least eight additional basic services and four more pay services have been announced. *Broadcasting,* November 30, 1981, at 36.

B. Shortcomings of the Present System

1. *Inability to Reflect Marketplace Values of Programming in Rates Charged Cable Systems.*—Experience under the current system suggests that the statutory formula prescribing royalty fees assessed cable systems is incapable of approximating market prices. The fees charged cable systems under Section 111 of the Copyright Act for the broadcast signals they import are based solely on a percentage of gross receipts from subscribers for basic cable service.[19] These percentages are arbitrary and bear no apparent relationship to the market value of the programming to the cable operator or program supplier. Furthermore, these percentages apply to all the programming on a signal, rather than particular programs supplied by different copyright holders. Finally, the Copyright Act gives the CRT authority to adjust royalty fees for inflation or changes in cable rates only every five years, thereby making it impossible for the Tribunal to respond quickly to changes in the programming marketplace. 17 U.S.C. § 804(a).

The Copyright Office, which collects the fees, has encountered serious difficulties in applying this imprecise royalty formula to certain cable industry practices. Some cable operators appear to be underpricing basic services in the belief that increases in subscribers and revenues received for pay and electronic information services will compensate for low rates in basic services.[20] Another practice that complicates valuation is the inclusion of programs subject to compulsory license in non-basic services, thereby giving rise to extremely difficulty problems in prorating gross receipts from such services.[21] Another problem is the practice of carrying only selected programming from a distant signal, requiring that a value be assigned to individual programs rather than an entire signal.

2. *Inability to Set Proper Return for Program Suppliers.*—Distribution of royalties among copyright holders has been even more problematic than royalty fee assessment. Claimants have been unable to agree on how to distribute the fund collected, and the CRT has been required to hold lengthy evidentiary hearings to determine rights to the 1978 and 1979 fees.[22] The CRT will likely be required to do the same for 1980 royalties. As of August 1981, almost $54 million in royalty fees had been collected but less than $8 million had been distributed.[23] The General Accounting Office noted in recent testimony before the Subcommittee that protracted disputes are inevitable under the compulsory license scheme:

> The current appeals of key Tribunal decisions attest to the vagueness of the legislated criteria since each of the appeals challenges the very basis of the Tribunal's decisions. Since there is no way to measure the value of a creation outside of the marketplace, it is virtually impossible to develop clear criteria that would be acceptable to copyright owners and users. If the Congress were to specify new criteria, the results would likely be new problems and controversies.[24]

It makes little sense for the CRT to attempt to establish a "marketplace value" when the system has eliminated the marketplace as the arbiter of fees. Since there is no better place to find "marketplace values" than in the marketplace, we believe that the current system should be replaced by the market in program licenses with full copyright liability.

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[19] The Copyright Act initially set rates at a sliding scale from .675 percent of gross receipts for the first distant signal to .2 percent for the fifth distant signal and each additional signal thereafter. 17 U.S.C § 111(d)(2)(B). The CRT has adjusted these rates upward in an effort to account for inflation and changes in rates for basic service. 46 Fed. Reg. 892 (1981).

[20] For example, Cablevision, Inc. was recently awarded the franchise for Boston, based on a bid proposing 52 channel basic service at a price of only $2 per month. *Broadcasting,* May 4, 1981, at 74.

[21] H.R. 3560 attempts to remedy this problem by giving the Copyright Office, in consultation with the CRT, authority to adopt regulations that would require compensation for imported signals offered outside of basic service. Title III, Section 4. This provision would do nothing, however, to resolve the intractable valuation problem facing the Copyright Office.

[22] Several parties have appealed the 1978 allocation to the United States Circuit Court of Appeals for the District of Columbia challenging the distribution criteria and requesting *de novo* distribution proceedings. National Association of Broadcasters v. Copyright Royalty Tribunal, Nos. 80-2273 *et al.* (D.C. Cir., filed October 20, 1980). As a result of these legal challenges, CRT has distributed only 50% of the fees collected for 1978 and stayed distribution of the balance. 46 Fed. Reg. 21637 (1981).

[23] NTIA Report, at 44.

[24] Testimony of Wilbur D. Cambell, Deputy Director, Accounting and Financial Management Division, United States General Accounting Office (June 11, 1981), at 16-17.

3. *Effects of the Present System.*—Given the CRT's inability to determine market prices, the amount a cable operator pays under Section 111 for the programs it retransmits may bear no relation to the economic benefit it generates. Similarly, the procedural and conceptual problems with allocating royalties may prevent a program producer from receiving revenues commensurate with the program's marginal cost of production.[25] Since efficient allocation depends on the ability of prices to reflect marginal costs and benefits, it is likely that the present compulsory licensing system produces inefficient allocations. If the prices paid by cable systems are too low or too high, cable systems will use these copyrighted materials more on less than is economically optimal. By the same token, if the receipts of copyright holders are too low or too high, they will produce less or more programming than would be economically optimal.[26]

Since available research indicates that the market for television programming appears to be highly price elastic, the loss in revenues to program suppliers resulting from the present law may result in a substantial drop in program supply. *See* FCC Network Inquiry Special Staff, Analysis of Television Program Production, Acquisition and Distribution, June 1980, at 228, and studies reviewed therein. NTIA has determined that copyright holders are paid significantly less under the compulsory licensing scheme than they would under a full copyright liability scheme. The NTIA Report estimates that if the cable industry negotiated for distant signals under full copyright liability, rights holders might receive an average of at least fifty percent more than the 1979 rates, and 30 percent higher than the current rate. NTIA Report, at 138. We note that NTIA's calculations are based on gross estimates of averages, and should not be regarded as a substitute for marketplace valuation of retransmission rights of a particular program or station.

The present system may also result in the misallocation of resources among alternative television distribution technologies. Cable television is the only technology governed by Section 111. Programmers of such other technologies as multipoint distribution systems ("MDS"), subscription television ("STV"), videodiscs and videocassettes all must negotiate in an open marketplace with program suppliers. Thus, the copyright law's special treatment of cable may artificially reduce its relative program operating costs, thereby artificially skewing prospective users toward cable and away from other, substitute services.

In addition, cable systems may elect to import distant television broadcast signals that are available at artificially low prices, even though their subscribers would prefer and be willing to pay more for alternate programming.[27] Finally, program producers may opt for distribution technologies that provide more control over use than broadcasting. For example, a program supplier might prefer a cable network (*e.g.*, Entertainment and Sports Programming Network), rather than a "superstation" (*e.g.*, WTBS, Atlanta) solely because the former mode offers greater copyright protection.

In summary, the market for television programming appears to be competitive and capable of functioning effectively without the imposition of government regulation. We believe that determination of costs and benefits are best left to the sellers (copyright holders) and buyers (cable systems), and ultimately to consumers through their private transactions rather than through administrative price arbitration.

C. Reimposition of Syndicated Exclusivity Rules is an Inadequate Solution to the Problem

The 1976 Copyright Act is being reconsidered at this time largely as a result of the FCC's recent decision to eliminate its distant signal importation rules[28] and syndicated program exclusivity rules. The Commission's decision allows cable systems to import an unlimited number of signals. As signal importation increases, so will audience diversion from broadcasters to cable systems, thereby increasing the misallocative effects and inefficiencies caused by the compulsory license.[29]

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[25] Marginal program production costs must be covered by revenues from all transmissions, cable and otherwise. By removing flexibility in assigning these costs to cable systems, the current compulsory licensing procedure may prevent some program producers from recovering revenues sufficient to cover these costs.

[26] *See* Besen, Manning & Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and Coase Theorem*, 21 J. Law & Econ. 67, 92 (1978); Cable Television Syndicated Exclusivity Rules, 71 F.C.C. 2d 951, 977 (1979).

[27] *See* NTIA Report, at 63.

[28] These rules limited the number of distant broadcast signals that cable systems could import. In the top 50 markets cable systems could import 3 network and 3 independent stations; in the second 50 markets, 3 network and 2 independents; in the smaller markets, 3 network and 1 independent. These rules were eliminated in 1980. Report and Order in Dockets 20988 and 21284, 79 F.C.C. 2d 663 (1980), *aff'd*, malrite T.V. of New York v. FCC, *supra*.

The Department believes, however, that reimposition of syndicated exclusivity requirements, as proposed by H.R. 3560, is an inadequate solution to the severe problems caused by the compulsory license scheme. Although syndicated exclusivity could allow copyright holders to capture more of the economic value of their product than is now possible, it is neither an adequate nor, indeed, a workable substitute for full copyright liability. It would not cover all television programming, nor would it allow copyright holders to capture full market value of their product.[30]

Moreover, syndicated exclusivity rules would impose substantial regulatory burdens on broadcasters and the FCC. For example, the provisions proposed in H.R. 3560 would require the FCC to (1) rule on waiver petitions for exemptions from the exclusivity rules; (2) issue rules governing notification of cable systems by broadcasters seeking exclusivity; and (3) rule within 90 days of submission by a broadcaster bringing a copyright infringement action on whether an alleged violation of the rules was due to technical error or other factors beyond the cable system's control. Broadcasters would be required to bear the expense of complying with the FCC's requirements for notifying cable systems of protected programming.

In summary, the Department does not believe that the statutory imposition of regulations such as sydicated exclusivity would provide a solution. While we recognize there may be a need for some period of transition, the only practical remedy is full copyright liability.

CONCLUSION

For the reasons discussed above, the Department of Justice recommends against enactment of H.R. 3560.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General.

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[29] Indeed, the FCC specifically stated that it was unable to determine the long-term effects on total payments to copyright holders from eliminating the syndicated exclusivity rules. Cable Television Syndicated Exclusivity Rules, Report, 71 F.C.C. 2d 951, 981-85 (1979).

[30] For example, in certain cases a program supplier might be able to maximize revenues by selling non-exclusive rights to both a cable system and broadcast station in the same market. Through open negotiation the supplier might be able to capture more from the cable system for the right to import a distant signal than under complusory license compensation.